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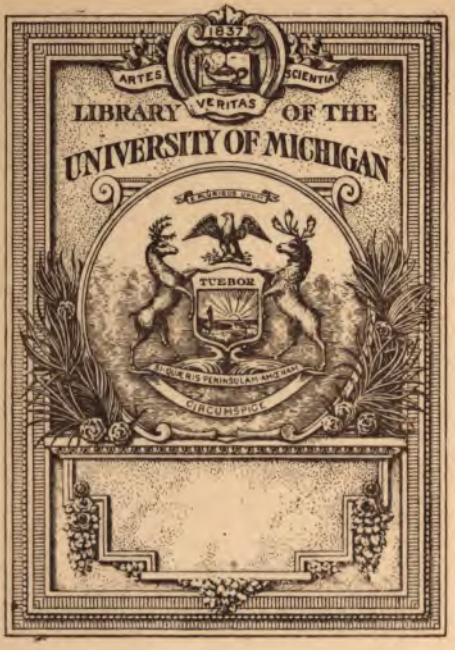
NATIONAL SUPREMACY

EDWARD S. CORWIN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NATIONAL SUPREMACY

TREATY POWER VS. *STATE POWER*

BY

EDWARD S. CORWIN

Of the Department of History and Politics,
Princeton University

"All observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government, not to the nature or extent of its powers."
—HAMILTON, in *Federalist* No. 31.

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1913

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Published July, 1913

This book is affectionately inscribed
to my Mother

364601

PREFACE

THE main purpose of the following study is to investigate the relation of the national treaty-power to State power. In the view of the framers of the Constitution, State power could not limit the National Government in the exercise of its granted powers. Of this view Article VI, paragraph 2 of the Constitution, is the authoritative statement. This paragraph at once recognizes the "reserved powers" of the States and provides that when any exercise of those powers comes into collision with a constitutional exercise of its powers by the National Government, the former must yield. Subsequently, however, with the development of the doctrine of State rights, the notion arose that the States possessed certain powers which were by nature inalienable and which, therefore, *had never been alienated.* From this notion it was further deduced that the National Government could not constitutionally so exercise any of its powers as to effect a control of subject-matter already under control by a State in the exercise of one of these inalienable "*police powers.*" Inevitably, this doctrine operated to curtail the theoretical extent of the treaty-power of the United States, though, as we shall see, this result seems never to have registered itself in bind-

ing judicial decision. The situation to-day is, therefore, that the early precedents defining the scope of the treaty-power in relation to State power are still *law*. Once again, moreover, they are in harmony with general doctrine. For who can doubt, since the decision in *Rahrer's* case (140 U. S. 545), that the police powers of the States are always to be exercised in subordination to national power? Recent decisions emphasizing the same doctrine from the side of national power are familiar to all.

But the writer has also had a second purpose in view. The doctrine of National Supremacy was first developed, as it chances, to secure the national treaties from infraction by the States. The tracing of the relation of the treaty-power to State power consequently afforded an opportunity to sketch the general history of the doctrine of National Supremacy that could hardly be put aside.

In preparing this study the writer has had valuable guidance from the writings of others, particularly from Mr. Butler's learned work on "The Treaty-Making Power." He wishes also to acknowledge his indebtedness to his friend Mr. Francis X. Carmody of the New York Bar for some valuable criticisms.

EDWARD S. CORWIN.

PRINCETON, N. J., May 20, 1913.

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NATIONAL SUPREMACY

CHAPTER I

THE PROBLEM AND THE MODE OF ATTACK

GOVERNMENT in the United States is dual, that is to say, the powers of government are distributed between the States and the National Government. The rule governing this distribution is as follows: The National Government has such powers, and those only, as are bestowed upon it in terms by the Constitution, while to the States are left all other powers which are not prohibited them by the Constitution. True, the National Government exercises what are known as "implied powers" but this is in consequence of Article I, section 8, paragraph 18, of the Constitution, which confers upon Congress the power to make "all laws necessary and proper" for carrying into execution its enumerated powers as well as those that are conferred in terms upon the other departments of the National Government; so that in strict constitutional theory the so-called "implied powers" of the National Government are of the same legal character as those

powers that are bestowed upon it in more precise terms. True, also, the State governments do not always possess all the powers that under the national Constitution belong to a State, but this is because the people of a State often choose to withhold the powers in question from their government and is, therefore, a consideration affecting only the internal policy of such States and not at all the constitutional law of the nation at large. In general, therefore, the rule above formulated as the one governing the distribution of powers between the States and the United States, under the national Constitution, is the correct one.

At first glance it might seem that this apportionment of power between the States and the National Government was of an accuracy to obviate all conflicts of authority between the two centers, and doubtless there were those in the Convention of 1787 who thought that the eternal riddle of what degree of independence and autonomy to leave in the localities, while at the same time preserving an adequate force at the center, had been solved, at least in terms, once and for all time. But if such belief was held, it was a delusion, for aside entirely from the fact that the vitality of a nation is not to be thus " cabined, cribbed, confined " by the intention of even the most perspicacious law-givers, there is the equally patent fact that the legal approaches to any given subject-matter of legislation are multifarious, wherefore it often happens that the same

subject-matter falls under governmental control in a considerable number of ways at one and the same moment. This would obviously be the case in any system of government. The peculiarity attaching to the American system is merely that governmental control is divided between two centers, so that while one center may be attempting to control a given matter in execution of power indubitably belonging to it, the other center may upon like grounds be attempting control of the same matter in a quite contradictory fashion and to quite contradictory ends.

The application of these remarks to the subject of this essay furnishes also their illustration. By the Constitution not only is the power to make treaties conferred in terms upon the National Government,[1] but it is specifically denied the States.[2] On the other hand, the Constitution plainly infers the possession by the States of broad powers of control over their internal concerns, powers which, when viewed from the point of view of the security, morality, and welfare of the community to which they are available, are called the "police powers." It has not a few times come about, therefore, as we shall discover in due course, that something done by a State in the supposed exercise of its police powers, has fallen athwart something done by the National Government in the supposed exercise of its power to make treaties. The question is at

[1] Art. II, Sec. 2, Par. 2.
[2] Art. I, Sec. 10, Par. 1; *cf. ib.*, Par. 3.

once prompted, what is the way out of such an *impasse?*

Turning, then, to the Constitution for enlightenment, our attention is first drawn to Article VI, paragraph 2, which announces that "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land," and "the judges in every State,"—and *à fortiori,* the judges of the United States,—"shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Indubitably this passage settles the fact that a treaty made "*under the authority of the United States*" overrides all conflicting provisions of State constitutions or State statutes, but the question still remains, whether *all* treaties, though made with all due form, can claim the sanction of the "authority of the United States." That authority rests upon the Constitution, which is thus the legal source of the treaty-power. Can the treaty-power then be conceived to be without constitutional limitation? The consequences of an affirmative answer to this question would not necessarily be so terrific as has perhaps been sometimes imagined—they might conceivably be rather negligible, since the actual check imposed upon the treaty-power by the method prescribed in the Constitution for its exercise—in other words, the political check—should be not a little

efficacious in practice. On the other hand, the notion of unlimited power, wherever lodged, has always been to the American mind an uncongenial one.[3] Indeed so true is this, that attachment to constitutional limitations enforceable by the courts has in the past amounted to a national superstition. Naturally the treaty-power, though no treaty has ever been declared unconstitutional, has not altogether escaped the action of this bias.

But admitting that the treaty-power is constitutionally limited, that the United States cannot do by treaty what it is forbidden by the Constitution to do at all, the question next arises, whether what we have called the police powers of the State comprise one of the limitations to that power. The provision of the Constitution that is usually brought forward in this connection is the Tenth Amendment, which reads as follows: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the People." The literal meaning of these words, it is submitted, is that the powers reserved to the States are reserved always in consequence of and conditionally upon their not having been delegated to the United States, so that once it is made out that an item of power has been really delegated to the United States, it is impossible to set up the contention that such power is constricted by supposed outstanding rights of the

[3] T. M. Cooley, "Constitutional Limitations" (1871), 173-7.

States. In other words, all that the Tenth Amendment signifies is a *specific* recognition of the fact *implied* by Article VI itself, that the States possess certain legislative powers. In the exercise of these, however, they may perchance transgress the Constitution, an act of Congress in pursuance thereof, or a treaty made under the authority of the United States. But when this happens, the pertinent provision of the Constitution is no longer the Tenth Amendment but Article VI, paragraph 2.

Nevertheless, obvious as this construction of the Tenth Amendment would seem to be, it is not the construction that it has invariably received, either with reference to the treaty-power or certain other powers, of the National Government. But by a shifting of emphasis from that clause of Amendment X, which marks the exception, to that clause which states the otherwise dominant rule, the Amendment has at times been construed as *if* it read, "the powers reserved *to* (or *by*) the States, are not delegated to the United States." And it is in consequence of this fact, and the confusion of doctrine thus exemplified, that it has become necessary to investigate afresh the constitutional relation between the treaty-power and the police powers of the State.

So much for the question. A word further as to the way of approach we have chosen to it, which is primarily the historical. For, as the late Samuel Butler remarks in one of his essays,

"The only way to understand a subject is to understand it historically." And if this is true of a biological theory, it is much more likely, I think, to be true of a matter like law, which is so *avowedly* historical in its manner of growth. But there is a second and more important consideration: The treaty-power is but *one* item of national power. The construction of it, the scope given to it by Constitutional Law, will be found to have tended to vary with those of the other principal items of national power; and with the measured swing of the pendulum from emphasis in the Federalist period upon national rights to emphasis upon State rights in the epoch between Jackson's accession to the Presidency and the outbreak of the Civil War, and with the swing back again in the succeeding generation, will be seen to have been subjected to very calculable exigencies of delineation by a Tribunal that bends, though but slowly, the established doctrine, to accommodation with settled national views. To put my intention in a single sentence, then, it is this: To trace the line between State power and the national treaty-power as a part of the whole pattern of American Constitutional Law, as that pattern has slowly developed.

CHAPTER II

THE SCOPE OF THE TREATY-POWER

BEFORE we proceed to our main topic, it will be worth our while to review briefly the whole general subject of constitutional limitations on the treaty-power, as these exist to-day. What, then, is signified by the question in general, as to the legitimate scope of the treaty-power? The formal answer to this question is, of course, not far to seek. By it is meant, within what limits is a treaty entered into by the United States legally binding. But, again, what is meant by the phrase "legally binding"? One of two things may be meant: First, legally binding upon the United States as a person at International Law; secondly, legally binding upon all individuals and things subject to the jurisdiction of the United States, as "supreme law of the land." In the former sense, *any* treaty entered into by the President and Senate of the United States, *acting in due form,* is binding, since International Law takes cognizance of the American Constitution to the extent, and *only* to the extent, of inquiring as to what functionaries are authorized by it to act for the United States in the business of treaty-making. And the United States, being a per-

son at International Law, is bound by this refusal of International Law to make further inquiries in the direction suggested. And this is a higher limitation upon the United States than any set by the Constitution: it binds even "the People of the United States" and is the *conditio sine qua non* of their membership in the Family of Nations.

Evidently, therefore, we are not further interested in the question, whether the United States would be bound in International Law by a treaty that the President and Senate, acting in due form, made in excess of their constitutional powers. By International Law, the United States is bound to observe its treaties or make due reparation.

The sole question before us, therefore, is this: Within what limits is a treaty entered into by the United States in the manner specified by the Constitution binding as "supreme law of the land," which on the one hand the courts may legitimately enforce as such, or which, on the other hand, Congress may legitimately supplement with appropriate legislation? [1]

In the first place, it seems to be established doctrine, that the treaty-power is limited in certain directions by the powers of Congress. Thus, while it is agreed on all hands that the treaty-making body

[1] Said the Supreme Court in the Cherokee Tobacco case: "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. *This results from the nature and fundamental principles of our government.*" 11 Wall. 616 (1870).

can enter into agreements creative of individual rights which the courts will enforce without supplementary legislation by Congress,[2] it is equally well agreed that it cannot appropriate money, since the Constitution provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law."[3] And from this it is generally held to follow, that Congress in making appropriations necessary to carry treaties into effect is a perfectly free agent. Such certainly seems to be the verdict usually deduced from the debate in the House of Representatives in 1796 upon Jay's Treaty, when the House discussed the policy of the treaty itself before voting the needed sums.[4] On the other hand, Congress has never in fact refused to vote an appropriation in such a case.

More doubtful is the question, whether Congress must be consulted before a commercial treaty altering the customs rates can be put into effect. In 1816, in connection with a commercial treaty with England, Congress was in fact consulted, but it seems to have been admitted even by the spokesmen of the House that the act putting the treaty into effect was *pro forma*.[5] In 1844, however, quite a different

[2] Hamilton in "Federalist," 23; United States *v.* Schooner Peggy, 1 Cranch 103 (1801).

[3] Art. I, Sec. 9, Par. 7.

[4] Henry Adams, "Life of Albert Gallatin," 161. *Cf.* Samuel B. Crandall, "Treaties, Their Making and Enforcement," 118-35.

[5] Report from Sen. Com. on For. Rel., February 27, 1816,

view was taken, the Senate this time proving remarkably backward in asserting its prerogative. But there is good ground for believing that there were peculiar reasons for its attitude on this occasion, the principal one being its hatred of President Tyler.[6] To-day, the settled practice admits Congress' participation in all customs agreements with foreign nations, such agreements being usually entered into in conformity with a general authorization from Congress, such as that given by the McKinley Tariff Law and again by the Dingley Law.[7] But judicial decisions, on the other hand, undoubtedly sanction the contrary view, namely, that the treaty-power *can* effect customs agreements with foreign powers without Congress being consulted.[8]

However, if Congress *is* consulted, it is as a free agent. And the mere fact that a treaty has been negotiated does not constrain it, through the oaths of its members to support the Constitution, to vote the required legislation. If there was ever doubt upon this point, it was certainly settled by the *Chinese Exclusion* cases,[9] upholding an act of Congress abrogating certain treaty arrangements with

Sen. Doc. No. 231, 56th Cong., 2d Sess., VII, 25. *Cf.* Crandall, 135-40.

[6] Report from Sen. Com. on For. Rel. of June 14, 1844; also Report of February 26, 1845: *loc. cit.*, VII, 36 and 40.

[7] Crandall, 142-6.

[8] Bartram *v.* Robertson, 122 U. S. 116 (1887). Whitney *v.* Robertson, 124 U. S. 190 (1888).

[9] Chae Chan Ping *v.* U. S., 130 U. S. 581 (1889), and Fong Yue Ting *v.* U. S., 149 U. S. 698 (1893); preceded by the

China. For if Congress can abrogate a treaty, provision for the abrogation of which is not incorporated in the treaty itself, then assuredly it cannot be bound to yield its assent to a treaty with reference to which it is consulted, nor to enact laws to put into operation a treaty which without such laws would remain inoperative. Contrariwise, if a "treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment," and repeal all conflicting prior acts of Congress.[10]

The treaty-power, then, cannot appropriate money nor bind Congress indefeasibly. Let us, however, consider yet another limitation, one which touches upon some interesting and important historical issues. In connection with the Louisiana Purchase in 1803, the Federalist opponents of the administration asserted, and Jefferson himself admitted, that while the treaty-power was competent, perhaps, to acquire territory, it was not competent to bring such territory into the Union. The argument was founded upon the proposition that to concede the treaty-power this competence was to allow it to transform the character of the Union.[11] In 1828, in the *American Insurance Company v. Canter*,[12]

Head Money cases, 112 U. S. 580 (1884), extending Taylor *v.* Morton, 2 Curt. 454 (1855).

[10] Whitney *v.* Robertson, *supra*, citing the Cherokee Tobacco case.

[11] Henry Adams, "History of the U. S.," II, Ch. IV and V.

[12] 1 Pet. 511 (1828).

Chief-Justice Marshall refused to say whether the United States had the right to acquire territory by virtue of its treaty and war powers or by virtue of its inherent sovereignty as a nation. In his famous opinion in the *Dred Scott* case,[13] Chief-Justice Taney reversed the point of view of 1803, arguing that the United States had the right to acquire territory *only* with a view to making it part and parcel of the Union. The earlier view, however, lies at the basis of the Court's decisions in the *Insular* cases.[14] In these decisions it was held that Porto Rico and the Philippine Islands are not parts of the United States as that term is used in the Constitution: first, because it was no intention of the treaty-making body to make them such, and secondly, because even had it been, that body were incompetent so to act, since only Congress may incorporate new territory with the United States.

The most recent exemplification of constitutional limitations upon the treaty-power arising from the rights of other departments is afforded by the circumstances attending the accession of the United States to the Hague Convention of 1907, establishing an International Prize Court.[15] In the original convention, this court is a court of appeal from prize courts of belligerents. Under the United States Constitution, however, jurisdiction in such cases falls to the regular courts, in which the total "judicial

[13] Scott *v.* Sanford, 19 How. 393 (1857).
[14] Especially Downes *v.* Bidwell, 182 U. S. 244 (1901).
[15] G. G. Wilson, "Handbook on Int. Law," App. IV, 554 ff.

power of the United States" is vested. In his message of December, 1909, therefore, President Taft urged the idea that the United States could not by treaty transfer to a tribunal not known to the Constitution such part of its judicial power as would be represented by the establishment of appeals from the United States district courts, sitting in prize cases, to the International Prize Court. He had accordingly, he said, despatched a circular note to the parties to the Hague Convention asking a special dispensation for the United States, by which the United States should be allowed, in lieu of granting appeals from its regular courts to the International Court, to be mulcted in damages in the latter for erroneous decisions of the former. And upon this basis the United States has finally become party to the convention in question.

But from the point of view of individual rights the most important limitations on the treaty-power are those comprised in the Bill of Rights of the United States Constitution. Consider, for example, a question which arose in connection with a certain clause of the Treaty of 1853 with France. By this clause it was provided that the consuls of either of the contracting powers stationed in the territories of the other should "never be compelled to appear as witnesses before the courts." [16] Relying upon this provision,

[16] "Treaties and Conventions" (1889), 351, Art. II of the Convention.

the French consul at San Francisco, the year following, refused to respond to a *subpœna duces tecum,* issuing in the name of the United States district court of San Francisco, and was accordingly brought into court on an attachment. The attorney for the consul urged the language of the treaty, while opposing counsel contended that the treaty was at this point void, as in conflict with the Sixth Amendment of the United States Constitution. Judge Hoffman ruled in favor of the consul, basing his decision upon the ground that the constitutional provision involved was designed, not to subject every individual to process, but to secure to the accused equal rights with the prosecution in the obtaining of testimony. Secretary of State Marcy, however, did not agree with this doctrine, asserting that, though "as the law of evidence stood when the Constitution went into effect, ambassadors and ministers could not be served with compulsory process to appear as witnesses," consuls were not understood to be vested with such diplomatic immunities.[17] Recent consular conventions give evidence that Secretary Marcy's contention is to-day accepted, at least as a guiding principle of negotiation.[18]

But the most vital and comprehensive of all con-

[17] John Bassett Moore, "International Law Digest," V, 167-8.

[18] Sen. Doc. No. 357, 61st Cong., 2d Sess., "Treaties, Conventions, Int. Acts," etc. (W. M. Malloy, editor: 1909): Convention of 1902 with Greece, I, 855-60; Convention of 1902 with Spain, II, 1701-10. This work will be hereafter cited as "Malloy."

stitutional restrictions upon the various powers of the National Government is afforded by the final clauses of the Fifth Amendment: "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The fact that the United States has often entered into claims conventions with other nations by the terms of which it has agreed to consider cancelled, for certain lump sums, the claims of American citizens against such nations, and the fact that such conventions have been upheld by the courts has sometimes given rise to the impression that the Fifth Amendment does not affect the treaty-power.[19] But this conclusion is undoubtedly erroneous. The validity of claims conventions is founded upon the fact that, owing to the maxim that a sovereignty can be sued only by its own consent, claims against such sovereignty can be regarded as only rights inchoate, for which the Government, by its action in compounding them, is enabled to substitute something of *real,* though possibly of less *nominal* value. Certainly the due process of law clause of the Fourteenth Amendment is the most pervasive of all constitutional restrictions upon the legislative powers of the States,[20] and there is an unmistakable tend-

[19] Charles Henry Butler, "Treating-Making Power of the U. S.," II, Secs. 442-4. *Cf.* Comegys *v.* Vasse, 1 Pet. 193 (1828).

[20] See Eugene Wambaugh, in *American Pol. Sc. Rev.,* IV, 483 ff.

ency on the part of the Court to treat the corresponding clause of the Fifth Amendment as similarly restrictive of the power of Congress,[21] even when legislating for unincorporated territory. Said Justice Brown in his opinion in the *Insular* cases:

"We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them . . . ; the right to personal liberty and individual property, to freedom of speech and of the press; to free access to courts of justice, *to due process of law, and to an equal protection of the laws;* . . . and to *such other immunities as are indispensable to a free government.*"

And the distinction thus tentatively afforded has become the basis of subsequent decision.[22] Resting upon the fundamental grounds that it does, it may be confidently claimed as establishing the limits, not merely of congressional power, but of the treaty-power as well, whenever it impinges upon private rights.

[21] See U. S. *v.* Adair, 208 U. S. 161, preceded by Northern Securities Co. *v.* U. S., 193 U. S. 197, Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, Sinking Fund Cases, 99 U. S. 700, Hepburn *v.* Griswold, 8 Wall. 603, and Scott *v.* Sanford, 19 How. 393.

[22] Hawaii *v.* Mankichi, 190 U. S. 197; Dorr *v.* U. S., 195 U. S. 138.

But if this reasoning be admitted to be correct, it must also be admitted to disclose why, with the advance of the science of constitutional jurisprudence, it becomes less hazardous, from the point of view of private rights, to insist upon the full rigor of the doctrine that the treaty-power is not limited by the reserved rights of the States. *For all rights are in the last analysis private rights.* The correct doctrine is that stated by Franklin on the floor of the Convention of 1787: "The interest of a State," said he, "is made up of the interests of its individual members. If they are not injured the State is not injured." [23] And the point of view of James Wilson was the same. "Can we forget," he exclaimed, "for whom we are forming a government? Is it for *men* or for the imaginary beings called *States?*" [24] And to the same effect were the words of King. He was

> "filled with astonishment, that, if we were convinced that every *man* in America was secured in all his rights, we should be ready to sacrifice this substantial good to the phantom of *State* sovereignty." [25]

However, before passing to our main topic, I would suggest one further restriction upon the treaty-power, namely, that it must be confined to its proper business and must be exercised in good faith.

[23] June 11, Farrand, I, 199.
[24] June 30, *ib.*, 483.
[25] Same date, *ib.*, 489. See also Madison, June 21, *ib.*, 357-8.

To quote a recent writer: "The treaty-making power . . . cannot be employed with reference to a matter not legitimately a subject for international agreement." [26] This same idea is sometimes given a more rigorous cast; and it is asserted that the treaty-power is confined to those interests which comprised the recognized objects of international negotiation at the time of the adoption of the Constitution. But to hold with this doctrine would be to deny to the treaty-power the benefit of canons of construction, which, more than once, have been applied to the powers of the National Government in general. The point has, of course, never been adjudicated, but upon general principles, it must be held, that the United States has equal capacity with other sovereign nations to adapt itself to the changing exigencies of international relations.

Finally, as was said before, the treaty-power is exercised under the authority of the United States, an authority which is defined and controlled by the Constitution and the structure of the government erected thereon. On the other hand, it is not defined and controlled by the reserved powers of the States, but these are often defined and controlled by it. The term "reserved powers of the States" can *never* be used with propriety as indicating a *restriction* upon the powers assigned by the Constitution to the National Government. It *can* be

[26] Westel W. Willoughby, "Constitutional Law of the U. S.," I, 504.

used with *logical,* though hardly with *rhetorical,* propriety to indicate the obvious fact that the powers of Congress, fairly construed, do not extend to all the recognized ends of legislation, but that many of these, simply by virtue of this plain inadequacy of the national legislative powers for them, fall exclusively to the States. But even this degree of propriety is denied to the use of the term in reference to the treaty-power of the United States, none of which the States retain and which is delegated to the United States without any stipulation at all as to the ends for which it shall be exercised, further than what resides implicitly in the nature of the power of negotiation when used "with constitutional *bona fides.*" Nor is the logical the only objection to the idea that the reserved powers of the States set a limit to the treaty-power. Equally grave is the objection on the score of history and that of expediency. And these are the three dimensions of the law: logic, which keeps it as self-consistent as may be and therefore prevents the intrusion of whim; precedent, which again rules out the arbitrary and keeps the law calculable; and expediency, which keeps it adaptable, without sacrifice of majesty or dignity.

CHAPTER III

THE SUPREMACY OF NATIONAL POWER

In this chapter I shall endeavor to trace the development during the period from 1783 to 1835 or thereabouts of certain fundamental principles of our constitutional jurisprudence, in connection particularly with the endeavor to secure the supremacy of the national treaties over State legislation; and in the following chapter I shall consider the range given the treaty-power in relation to State power during the same period, both in practice and in constitutional interpretation.

"The best keys to the true objects of all laws and constitutions," wrote Madison in 1828, with reference to the national Constitution, "are furnished by the evils which were to be cured or the benefits to be obtained." [1] Back of the Convention of 1787 lay the period of the Confederation, during which the United States, "one nation to-day and thirteen to-morrow," were not only unable to treat with foreign nations on a footing of equality, but internally were prey to disorder of a most alarming character. The fallacy of the Articles of Confedera-

[1] "Letters and Other Writings of James Madison" (1865), III, 655.

tion was twofold: on the side of theory they thrust into the hands of the States the great bow of "Sovereignty" which those feeble entities were utterly unable to string for effective action; on the side of practice, they left the National Government dependent upon the States for the carrying out of its powers. The results for our standing as a nation were most fatal. Not only were our negotiators abroad unable to get the treaties they were instructed to obtain, but at home the treaty obligations we had already incurred, particularly those of the Treaty of Peace with Great Britain, which accorded us the recognition of our independence, went not merely disregarded but openly flouted by the States. "The files of Congress," Madison testified at the close of this era, "contain complaints (of treaty violations) . . . from almost every nation with which treaties have been formed. Hitherto," he continued, "indulgence has been shown us," but "this cannot be the permanent disposition of foreign nations. A rupture with other powers is the greatest of calamities. It ought, therefore, to be effectually provided that no part of a nation shall have it in its power to bring them on the whole." [2] And the point of view of Madison was that of all those to whom fell the conduct of the foreign relations of the United States at this period. It was quite inevitable, therefore, that these men should have been among

[2] Max Farrand, "Records of the Federal Convention," I, 316.

the first to break away from extreme notions of State prerogative and to undertake the construction of a workable theory of national sovereignty.

One of these men was John Jay, who was in 1786 "Secretary of the United States for Foreign Affairs." On October 13th of this year Jay presented a report to the Confederate Congress [8] bearing upon a complaint from the British Government which had been transmitted some months earlier through John Adams, our minister at the Court of St. James, that the United States had failed to comply with Article IV of the Treaty of 1783, which stipulated that creditors on either side should meet "with no lawful impediment to the recovery of the full sterling money, of all *bona fide* debts heretofore contracted." The British complaint further recited in some detail certain acts passed at various dates,—subsequent as well as previous to the Treaty,—by the legislatures of Massachusetts, New York, Pennsylvania, Virginia, Maryland, North Carolina, South Carolina, and Georgia, which impeded the collection of said debts, by pronouncing them, in the exercise of a right which the enacting States pretended to under International Law, to be sequestrated, as enemy's property, to their several exchequers. With this statement of facts before him, Jay proceeded to raise certain questions and to return thereto certain answers that are of the greatest significance in the history of American Constitutional Law and

[8] "Secret Journals of Congress" (1821), IV, 185-287.

particularly of that branch of it which has to do with the treaty-power.

"On considering the before recited papers," he writes, "these important questions present themselves:

"1. Whether any individual State, has a right, by acts of its own internal legislature, to explain and decide the sense and meaning in which any particular article of a national treaty shall be received and understood within the limits of that State?

"2. Whether any and which of the acts enumerated in the list of grievances do violate the Treaty of Peace between the United States and Great Britain."

3. (Omitted) and

"4. What measures should be adopted in relation to the State or States which passed the exceptionable acts?"

The answer that Jay returned to the second question is only in part relevant to our interest. Propounding the query whether the States were competent to pass acts of sequestration before the Treaty of 1783 went into effect, he laid down the following doctrine: "the rights to make war, to make peace, and to make treaties, appertaining," by Articles VI and IX of the American Constitution,

"exclusively to the national sovereign, that is, to Congress, your secretary is of the opinion that the thirteen State legislatures have no more authority to exercise the powers, or pass acts of sovereignty on those points, *than any thirteen individual citizens.* To

execute the laws, or execute the rights of war against a national enemy, belongs only to the *National Government,* or to those to whom the National Government may constitutionally delegate such authority."

Jay thus took the position nearly three years before the Constitution went into effect that there was a national *sovereignty* vested with the exclusive right of determining the relations of the United States with foreign states; and from this premise issue his answers to his other questions. "Your secretary," he writes, restating his fundamental proposition,

"considers the thirteen independent sovereign States as having, by express delegation of power, formed and vested in Congress a *perfect though limited sovereignty* for the general and national purposes specified in the Confederation. In this *sovereignty* they cannot severally participate (except by their delegates) or have concurrent jurisdiction; for the ninth article of the Confederation most expressly conveys to Congress the sole and exclusive right and power of determining war and peace and of entering into treaties and alliances, etc. When therefore a treaty is constitutionally made, ratified, and published by Congress, it immediately becomes binding on the whole nation and superadded to the laws of the land, without the intervention, consent, or fiat of State legislatures. It derives its obligation from its being a compact between the sovereign of these and the sovereign of another nation. . . . Hence it is clear that treaties must be implicitly received and observed by every member of the nation; for as State legislatures are not competent to the making of such compacts or

treaties, so neither are they competent . . . authoritatively to decide on or ascertain the construction and sense of them."

Indeed even Congress has no such authority, but the "sovereigns only, who are parties to the treaty . . . by posterior articles and mutual consent." As to doubts in cases between private individuals, "respecting the meaning of a treaty," they,

"like all doubts respecting the meaning of a law, are in the first instance mere judicial questions, and are to be heard and decided in the courts of justice having cognizance of the causes in which they arise, and whose duty it is to determine them according to rules and maxims established by the laws of nations for the interpretation of treaties."

The implications of the doctrine contained in this passage are as obvious as they are important. In the first place we have here the doctrine of the *sovereignty* of the General Government within the range of the powers granted it; secondly, we have the corollary doctrine of the supremacy of all constitutional acts of the General Government over conflicting acts of the State legislatures; in the third place, we have the doctrine of the duty of the State judiciaries to enforce as part and parcel of the law of their respective States law which derived its legal sanction from the national sovereignty. Relying upon these propositions, the contrary to which, he asserted, "would not only militate against the

common and received principles and ideas relative to this subject, but would prove as ridiculous in practice, as . . . irrational in theory," Jay urged upon Congress three resolutions. The first of these denied explicitly the right of the legislatures of the States to pass acts "explaining or construing a national treaty," or "restraining, limiting, or in any manner impeding, retarding, or counteracting the operation or execution of the same"; the second stated that "all such acts as may be now existing in either of the States, repugnant to the Treaty of Peace, ought to be forthwith repealed;" and the third recommended that such repeal should be by description rather than recitation of such acts, and further that the State should pass acts providing that

"the courts of law and equity in all causes and questions cognizable by them respectively, and arising from or touching the said treaty, shall decide and adjudge according to the true intent and meaning of the same, anything in the said acts or parts of acts to the contrary thereof in any wise notwithstanding."

The following March Congress adopted the above resolutions without a dissenting vote, and the following April, within a month of the assembling of the Convention at Philadelphia, they were transmitted to the several legislatures,[4] by some of which at least they were complied with at once.[5]

[4] "Journals of Congress" (1801), XII, under dates of March 21 and April 13, 1787.

[5] New Hampshire, Massachusetts, Rhode Island, Connecti-

It is true, of course, that the compliance took the form of a repeal of the acts complained of by Congress. But it would be a mistake to suppose that either the recommendation by Congress of this course or its pursuit by the legislatures comprised a recognition of the validity of the acts rescinded. Indeed, so far as the recommendation at least is concerned, the exact contrary was obviously the case. The acts were repealed certainly by the bodies that enacted them, but this was because repeal was at that date, while as yet judicial review was but an idea in the air, the only way of getting them off the statute book: the repeals themselves, however, may very well have been grounded upon the original invalidity of the acts. And as fortifying this view of the matter, it is worth noting that while the Convention was in session, the supreme court of North Carolina, in the case of *Bayard v. Singleton,* declared the Articles of Confederation to be a "part of the law of the land, unrepealable by any act of the General Assembly." [6]

But returning once more to our main topic, the elaboration of the principles of national sovereignty, particularly by those whose major concern was to secure the supremacy of the national treaties over conflicting State enactments, the first thing we dis-

cut, Delaware, Maryland, and North Carolina. Virginia passed such an act, but suspended its operation till the Governor of the State should issue a proclamation giving notice that Great Britain had surrendered the Western posts.

[6] 1 Martin (N. C.), 42 (47).

cover is that, as Congress was indebted to Jay for the principles laid down in its resolutions of March 21, 1787, so Jay in turn was indebted to his associate at the New York bar, Alexander Hamilton, who in 1783, in the case of *Rutgers v. Waddington*,[7] had developed the argument in behalf of his client, the defendant, that the so-called Trespass act, which had been recently enacted by the New York legislature, was void and of no effect, as in conflict with the Treaty of Peace. Even earlier than this, in connection with the subject of securing from the States their quotas of the congressional requisitions, Madison had urged the right of Congress to coerce dilatory or recalcitrant members of the Union.[8] At the same time Wilson of Pennsylvania was formulating a theory that the General Government possessed inherently, that is in its quality as the depository of the national sovereignty, not merely the powers delegated it by the Articles of Confederation, but all other powers of a national sovereign state, the presumption of its possession of which was not defeated by explicit provisions of the Articles.[9] Even Jefferson, at this period a representative of the United States at the Court of France,

[7] For Rutgers *v.* Waddington, see Thayer, "Cases on Constitutional Law," I, 63-72; also Brinton Coxe, "Judicial Power and Unconstitutional Legislation," 223-33; as to the results of the case, see Hamilton's Works (Lodge's ed.), V, 116, and VII, 198.

[8] W. C. Rives, "Life and Times of James Madison," I, 303-4.

[9] Works of James Wilson (Andrews ed.), I, 558.

took a tone that was not merely nationalistic, but positively inimical to the pretensions of the State legislatures. Thus, in February, 1787, we find him writing from Paris to John Adams, criticising the latter for having spoken of Congress as a "diplomatic assembly": "Separating into parts," he urges,

> "the whole sovereignty of our States, some of these parts are yielded to Congress. Upon these I should think them (Congress) both *legislative and executive,* and that they would have been judiciary also, had not the Confederation required them for certain purposes to appoint a judiciary. It has accordingly been the decision of our courts that *the Confederation is a part of the law of the land and superior to the ordinary laws,* because it cannot be altered by the legislature of any one State. I doubt whether they are a diplomatic assembly at all." [10]

A little later Jefferson was writing a friend, that the great problem of the moment was to "curb the State legislatures."

And the tone thus struck we find loyally kept to, once we pass the portals of the federal Convention. Thus the origin of the Union, we find Hamilton and Wilson referring to the Declaration of Independence which pronounced the States independent, not "individually" but "unitedly." True Luther Martin of Maryland dissented from this view: the

[10] Writings of Jefferson (Mem. ed.), VI, 98.

Declaration left the States in a state of nature with reference to each other, and in that state they continued until the formation of the Confederation, which still left them sovereign. But by *sovereignty* Martin seems to have had chiefly in mind the *equality* of the States in the Congress of the Confederation, an equality which he fought bitterly but unavailingly to have retained under the new system. For the rest, the notion of the States as sovereign, in the sense of their being the final or the highest source of authority in the Union, is repeatedly attacked and never explicitly defended. Even Gerry of Massachusetts, who ultimately refused to sign the Constitution because he thought it lodged too much authority with the National Government, pronounced the notion an "intoxication." Madison was equally outspoken and very explicit: "The States," he declared.

> "never possessed the essential rights of sovereignty. These were always vested in Congress. . . . The States at present are only great corporations having the power of making by-laws, and these are effectual only if they are not contradictory to the General Confederacy."

King of Massachusetts spoke to much the same effect, bringing out also the inadequacy of the States in the realm of war, peace, and treaty-making as comprising the foremost reason for the existence of a national sovereignty and the impossibility of local

sovereignties in the true sense of the term. Mr. King, Madison records,

"conceived that the import of the term States, sovereignty, national, federal, had often been used and implied in the discussions inaccurately and delusively. The States were not 'sovereign' in the sense contended for by some. They did not possess the peculiar features of sovereignty—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereigns. They had not even the organized faculties of defense or offense, for they could not of themselves raise troops or equip vessels for war. On the other side, if the Union of the States comprises the idea of a confederation, it comprises that also of consolidation. A union of the States is a union of the men composing them, from whence a national character results to the whole. Congress can act alone without the States; they can act, and their acts will be binding against the instructions of the States. If they declare war, war is *de jure* declared; captures made in pursuance of it are lawful; no acts of the States can vary the situation, or prevent the judicial consequences. If the States therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it. If they formed a confederacy in some respects, they formed a nation in others." [11]

[11] For the matter of the above paragraph see Farrand, "Records of the Federal Convention," under dates June 19, 27, 28, 29, I, 313-33, 437-79.

But turning from the discussion of theory to the practical problem before it, the Convention found itself divided by the most fundamental differences of opinion and motive. It is, therefore, the more striking that upon one topic, its members, whether from large States or small, whether of State-rights or nationalistic predilections, whether from North or South, were in unanimous agreement, namely, that the national authority, whatever the range of powers to be assigned to it, must with respect to such powers be absolutely assured of supremacy over State authority, a competence which under the Articles of Confederation, owing to the fact of their ratification by the State legislatures, was thought by some to be at least conjectural. Thus all plans introduced into the Convention provided *à outrance* for such supremacy, while the tone of discussion made it evident that the particular consideration that rose spontaneously to all minds in support of the idea was the notorious fact that under the Confederation the treaty obligations of the whole had been repeatedly flouted by the particular legislatures.[12]

But how secure such supremacy? Here once more a grave difference of opinion obtruded itself. The Randolph plan proposed in its sixth resolution that the "national legislature ought to be empowered . . . to negative all laws passed by the

[12] For the various plans submitted to the Convention, see Farrand, III, 591-630.

several States contravening, in the opinion of the national legislature, the Articles of Union, or any treaty subsisting under the authority of the Union," and on May 31st, the Convention, sitting in committee of the whole, agreed to this proposition without debate. This result encouraged Charles Pinckney to go a step further, and on June 8th he moved that "the national legislature should have authority to negative *all* laws which they should judge to be improper." The motion was seconded by Madison, who instanced "the constant tendency of the States to oppress the weaker party within their respective jurisdictions" and urged the necessity in the General Government of a prerogative to "control the centrifugal tendency of the States." Another champion of the idea was Wilson of Pennsylvania, though he recognized that the States would probably set up a great clamor against such control; for "as the savage is unwilling to purchase civil liberty by the surrender of his personal sovereignty in a state of nature, so would the States be unwilling to yield their political sovereignty."

At this point, however, the tide of discussion began to turn, and Bedford of Delaware, at this date a spokesman for the State-rights contingent, succeeded in uncovering some objections to the practicability of Pinckney's idea that caused even Madison's enthusiasm to wane. A week later, Paterson introduced "the small State plan," the sixth resolution of which, obviously traceable to Jay's third

resolution, and less remotely to the circular letter of Congress of the preceding April, provided that

"all acts of the United States in Congress made by virtue of and in pursuance of the powers hereby . . . vested in them and all treaties made or ratified under the authority of the United States shall be the supreme law of the respective States, so far forth as those acts or treaties shall relate to the said States or their citizens; and that the judiciary of the several States shall be bound thereby in its decisions, anything in the respective laws of the individual States to the contrary notwithstanding." [18]

The question of the means of maintaining the supremacy of the national laws and treaties came up again on July 17th, in connection with the report of the committee of the whole, which carried with it the Randolph proposition on this point. Gouverneur Morris, however, good nationalist as he was, opposed the idea of a national veto, even within the limits set to it in the report, "as likely to be terrible to the States." But it was Sherman of Connecticut who made the greatest contribution to the discussion, declaring such a power unnecessary, as "the courts of the States would not consider valid any law contravening the authority of the Union," indeed, as "involving a wrong principle, to wit, that a law of a State contrary to the Articles of Union would, if not negatived, be valid and operative."

[18] See also the tenth article of Hamilton's plan.

Madison, on the other hand, was not so easily convinced: "Confidence," he said,

> "cannot be put in the State tribunals as guardians of the national authority and interest. In all the States these are more or less dependent on the legislatures. In Rhode Island the judges who refused to execute an unconstitutional law were displaced and others substituted by the legislature, who would be the willing instruments of the wicked and arbitrary plans of their masters."

In the vote that ensued upon this discussion, the veto idea was rejected by a vote of seven States to three; after which the proposition embodied in the Paterson plan, being moved by Luther Martin, was adopted without a dissenting vote.[14]

But was this disposition of the matter understood to leave the national supremacy entirely with the State judges? That it was not is proved conclusively by the discussion which attended the proposition to provide for inferior federal courts. In this discussion the State-rights party, who opposed the proposition, placed themselves upon this ground: "State tribunals might and ought to be left in all cases to decide in the first instance, the right of appeal to the national tribunal being sufficient to secure national rights and uniformity of judgment." In other words, the utmost concession that was demanded at this point by the pro-State party in the

[14] Farrand, II, 20-39.

Convention was jurisdiction in the first instance of cases arising under the national Constitution, laws, and treaties, with subsequent appeal to the United States Supreme Court. Nor did that party obtain even this much, as it was ultimately provided that the "judicial power of the United States" should be vested in one supreme court and in such inferior courts as Congress might from time to time establish. Still it was hoped, to quote Sherman of Connecticut, by those solicitous for the safety of the States under the new system, that Congress would "make use of the State tribunals whenever it could be done with safety to the general interests." [15] This hope was realized by the Judiciary Act of 1789, the work of Sherman's associate, Ellsworth, which by its famous Twenty-Fifth Section left cases arising under State laws, wherein were subsequently drawn in question the national Constitution, laws, or treaties, or where any right or privilege was claimed under these, to be determined in the first instance by the State tribunals, an appeal to the Supreme Court of the United States being provided only where the national authority thus drawn into question or the right or privilege claimed under it, was finally disallowed by the highest State tribunal taking cognizance of the causes.[16] The final upshot of the matter was stated by Madison thus, on the floor of the Convention in answer to a question by Messrs.

[15] Coxe, "Judicial Power, etc.," 342-8.
[16] 24 September 1789, c. 20, Sec. 25 (1 Statutes at Large), 85.

Gorham and Langdon, as to what security existed against the States' levying import duties in the guise of tonnage duties:

"There will be the same security as in other cases. The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States. His own opinion was, that this was insufficient. A negative on the State laws alone could meet all the shapes which this could assume. But this had been overruled." [17]

And thus much for the moment of the intentions of the Convention that framed the Constitution, intentions which at least at all points of interest to our inquiry were frankly presented to the country by the friends of the new system, while its ratification was pending, and which, to say the least, were not underestimated by its opponents, in their terror-stricken appeals to the spirit of localism. Let us turn now to consider how these intentions were cherished and developed by that body to whom falls the final interpretation of the Constitution, during the first generation of our national history, and especially in connection with the maintenance of the supremacy of the national authority over State authority. This is not a matter that we need enter upon in great detail, for our review in the follow-

[17] September 12, Farrand, II, 589. Also "Federalist" (Lodge ed.), Nos. 39 and 78.

ing chapter, of the application made by the Court of the guiding principles of its construction of the Constitution to the treaty-power, will supply adequate illustration of those principles, a rapid review of which will, therefore, suffice at this point.

Because the exact phase of the treaty-power we are dealing with in this essay is its relation to and effect upon certain powers of the States, the first decision to which our attention is drawn is that in *Chisholm v. Georgia,*[18] wherein the Supreme Court was called upon for the first time to evaluate State pretensions that clashed with a national authority. By Article III, paragraph 2, of the Constitution as it originally stood, the judicial power of the United States extended without qualification to controversies between a State and citizens of another State. In *Chisholm v. Georgia* a citizen of South Carolina was endeavoring to sue the State of Georgia in the United States Supreme Court. Notwithstanding the perfect explicitness of the language of the Constitution, the attorneys for the defendant State contended that the provision of it in question must be construed in light of the principle that a sovereign can be sued only in its own courts and at its own consent,—a line of argument in support of which they were unfortunately able to quote Hamilton in "The Federalist" and Marshall in the Virginia convention.[19] In other words, State sovereignty

[18] 2 Dall. 419 (1793).

[19] "Federalist," No. 81; Elliot, "Debates" (1836), III, 551 f.

was set up as a sort of interpretative principle limiting the operation of the Constitution. Not only was this contention overruled by the Court by a vote of four to one, but in the opinions of Chief Justice Jay and Justice Wilson the applicability of the term sovereign to the governments of the States was flatly denied: that designation, they asserted, was appropriate only to the "People of the United States," who had ordained and established the Constitution. At least, said Wilson, putting the whole matter in a nutshell, "*As to the purposes of the Union, Georgia is not a sovereign State.*"

The single dissent was by Justice Iredell, who based his argument upon the following proposition: "The United States are sovereign as to all the powers of government actually surrendered. Each State in the Union is sovereign as to all the powers reserved." But, urged the affirming judges, the power of the United States Supreme Court to take jurisdiction of cases arising between a State and citizens of another State is, by the terms of the Constitution, exactly one of the powers surrendered. Obviously, the only way to make sense of Iredell's formula, which he seems to have invented as far back as the North Carolina Convention of 1788, is to regard the so-called "reserved powers" of the States as having been positively reserved, and not simply contingently upon the National Government's not possessing a power susceptible of being exercised in a fashion to traverse them. Or, to put the mat-

ter in its converse terms,—Iredell's notion, in support of which he presumes to quote the Tenth Amendment, plainly was, that the States remained under the Constitution in the possession of powers which no national power could be constitutionally extended to invade or transgress.

Chisholm v. Georgia was immediately followed by the adoption of the Eleventh Amendment, taking from the Supreme Court the jurisdiction asserted in that case. Despite this seeming adversity, however, it is difficult to see why that Amendment by the very necessity it admits of specific stipulation when an exception is to be pleaded to the constitutional powers of the National Government, does not confirm the logic of the decision, the practical consequences of which it was adopted to avoid. However this may be, *Chisholm v. Georgia* does in fact foreshadow the point of view from which the Constitution was to be interpreted by the Supreme Court for more than forty years, thenceforward. Nor is to recognize this to detract from the proper fame of the great Marshall, who for more than a generation manipulated the engines of constitutional exegesis, in the light furnished him by his intimate acquaintance with the dominant spirit of 1787, as well as in the light of his own statesmanlike perception of the needs of a growing nation. It cannot be said of Marshall with entire accuracy, that he "created for us the principles of interpretation which have governed our national development."

For some of these—he would have said all of them —he inherited from the framers of the Constitution and from his precursors on the Supreme Bench. But it can be said of him that *so far as he created,* he created "like a great statesman who sees his way as clearly without precedent as with it to those renderings of charter and statute which will vivify their spirit and enlarge their letter without straining a single tissue of the vital stuff of which they are made." [20] Marshall shares with Lincoln a certain quality of uniqueness in the annals of statesmanship. For if the career of the one was the singular product of American Democracy, that of the other was the fine fruit of American Constitutionalism.

But turning to consider Marshall's particular contribution to the matter under immediate discussion, we find it to have been his elucidation of that supremacy which is secured to the national law and treaties by Article VI of the Constitution, as the *faculty of the national government, in the exercise of its constitutional powers, to displace conflicting State authority of whatsoever sort or upon whatsoever basis pretending to rest.* Writing in "The Federalist," Hamilton had already pointed out that the exclusive use of some of its powers is secured to the National Government by the corresponding prohibitions laid upon the States,—such, for exam-

[20] Woodrow Wilson, "Constitutional Government in the United States," 58-9.

ple, being the case with the treaty-power; that, secondly, other powers are of such a nature that the mere fact of their being conferred upon the National Government expelled the States from the premises, in which connection Madison had even on the floor of the Convention instanced the power to regulate foreign and inter-state commerce; and that, finally, other powers had been delegated to the National Government with the expectation that until that government should enter upon the active exercise of them, they should continue available to the States, as, for example, turned out to be the case with the power to regulate bankruptcy.[21] But this classification, far from exhausting the points of intersection of State and National powers, does not even hint the real crux of the difficulty, which arises from the fact that the States may in the exercise of powers not by name prohibited them by the Constitution, nor yet transferred thereby in terms to the National Government, clash with the exercise by the National Government of powers which are so transferred. But in this case, equally with those others just mentioned, Marshall taught, the States must give way, since with reference to the powers delegated it, the National Government has all the powers that a centralized state would have.

The great decisions in which Marshall applied his doctrine in connection with the legislative

[21] "Federalist," No. 32; see also Ogden *v.* Saunders, 12 Wheat. 213.

powers of Congress we need to consider only in the most cursory fashion, as preparatory to our more detailed study, in the chapter following, of its application in connection with the treaty-power. In *McCulloch v. Maryland*[22] Marshall applied his doctrine of national supremacy in such manner as to sweep aside a very indirect application by a State of its vital power of taxation to subject-matter which owed its existence to the exercise by Congress of an implied power. Congress, as an incident of its power to borrow money, had chartered a bank; this bank in turn had established a branch at Baltimore; the State of Maryland attempted to tax this branch bank, as one of those doing business within the State without a charter from the State legislature, upon its business of note-issue, a faculty which had much to do with its capacity as a bank, but little to do with its capacity as fiscal agent of the United States.[23] This tax Marshall pronounced unconstitutional. "The sovereignty of a State," he wrote,

"extends to every thing which exists by its own authority or is introduced *by its permission;* but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the *people of the United States?* We think it demonstrable that it does not. Those powers are not given by the people to a single state. *They*

[22] 4 Wheat. 316 (1819).
[23] *Cf.* J. Miller in Crandall *v.* Nevada, 6 Wall. 35 (1867).

are given by the people of the United States to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently the people of a single state cannot confer a sovereignty which will extend over them. . . . That the power to tax involves the power to destroy . . . (is a proposition) not to be denied. . . . If the States may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights. . . . They may tax all the means employed by the Government, to an excess which would defeat all the ends of Government. This was not intended by the American people. *They did not design to make their Government dependent on the States.*"

As reinforcing this argument it is a noteworthy circumstance that counsel for Maryland did not attempt very seriously to challenge its premises, but relied for the most part upon the contention that the act of Congress establishing the bank was unconstitutional,—a contention which, of course, Marshall repelled in that part of his opinion wherein he gives judicial sanction to the doctrine of implied powers.

The principles he had developed in *McCulloch v. Maryland* with reference to the taxing power of the States, Marshall applied in *Cohens v. Virginia*[24] and *Gibbons v. Ogden*[25] with reference to what to-

[24] 6 Wheat. 264 (1821). [25] 9 Wheat. 1 (1824).

day is called, and what he himself designates in a later case as, the "police powers" of the States. In *Cohens v. Virginia,* plaintiff in error had been indicted, tried, and penalized under a Virginia statute for attempting to sell within that State tickets for a lottery that had been established by Congress in the District of Columbia. In part counsel for Virginia relied upon contentions which it is not relevant for us to note, but they also argued that either the charter of the lottery company was not intended by Congress to run outside the District of Columbia and that, therefore, no law of the United States was traversed by the Virginia statute, or that if it was intended so to run, it was unconstitutional. Ultimately Marshall dismissed the writ of error upon the previous ground, but before he did so, he plainly indicated his persuasion, resting on the principles elaborated in *McCulloch v. Maryland,* of the competence of Congress in the premises. In other words, he was ready to assert that if Congress, in the exercise of its constitutional powers, should enact a law for the government of the District of Columbia, which conferred rights within a State, a State law conflicting with such rights would to that extent be inoperative, even though enacted in the furtherance of the public morality of the State.

Not less pertinent is the decision in *Gibbons v. Ogden,* which arose out of the attempt of New York to confer a monopoly upon Robert Fulton and others of the right to use steamboats on the Hudson

River and other navigable waters within the jurisdiction of the State. In a decision which, because of the vast considerations with which it deals, has been approached first and last through every sort of bias and has been repeatedly distorted, by counsel and court alike, Marshall pronounced the monopoly, so far as affecting navigation upon the Hudson to a point without the State, to be void, upon the following grounds: (1) that the Hudson was a part of the navigable waters of the United States, the use of which for commerce among States fell under the Commerce Clause of the Constitution to the regulation of Congress. (2) That Congress had, by the Act of 1793, stipulated the conditions under which the waters subject to its control were to be used for the purposes of navigation. (3) That the monopoly conferred by the State of New York conflicted with the act of Congress. Webster, for appellant, adopting Madison's view of the matter cited above, sought to have the Court declare that Congress' power in the premises was exclusive, so that even had it not been exercised New York would still have been precluded from acting as she had done. This invitation, however, Marshall for the nonce declined, though subsequently, in *Brown v. Maryland,* where he ruled that a Maryland statute taxing the sale of goods introduced into the State through foreign commerce was void, he seems to have gone quite that far. But though he had adopted Webster's argument at this

point, in *Gibbons v. Ogden,* the matter would not even then, by his own admission, have been concluded. Thus he writes:

"Since, however, in exercising the power of regulating their own *purely internal affairs, whether of trading or police,* the States may sometimes enact laws the *validity of which depends on their interfering with and being contrary to, an act of Congress,* passed in *pursuance* of the Constitution, the Court will enter upon an inquiry whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress and deprived a citizen of a right to which that act entitles him. *Should this collision exist, it is immaterial whether those laws were passed by virtue of a concurrent power to regulate commerce with foreign nations and among the several States, or in virtue of a power to regulate their domestic trade and police. In one case and the other the acts of New York must yield to the law of Congress.*"

The import of this language is, of course, obvious, but so entirely relevant is it to our main inquiry that other passages further elaborating the same idea will be worth our while. Referring to State inspection laws, Marshall writes thus:

"That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. *They form a portion of that immense*

mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State and those which respect turnpike roads, ferries, etc., are component parts of this mass."

Such, in a word, are the reserved rights of the States, their powers of internal police.

And what is the relation of national power to these reserved powers? Marshall answers the question thus:

"*No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the Government of the Union, in the exercise of its express powers . . . may use the means that may also be employed by a State in the exercise of its acknowledged powers.*"

And if it does so, and State authority and national authority come into conflict? "It has been contended," Marshall recites,

"that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Con-

stitution, they affect the subject and each other like equal and opposing powers. But the framers of our Constitution foresaw this state of things and provided for it by declaring the supremacy, not only of itself, but of the laws made in pursuance thereof. *The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme.*" Where therefore the Federal Government has acted, "*In every such case the act of Congress or the treaty is supreme; and the laws of the State, though enacted in the exercise of powers not controverted, must yield to it.*"

This language, it is submitted, if it be regarded as having the force of law, is decisive of the question under discussion in this essay. Marshall describes the police powers of the States in their utmost extent; he discusses the contingency of a conflict between State legislation based upon those powers and national legislation enacted in virtue of the powers conferred upon the National Government; and he rules that in every instance the latter has the right of way. Applying the principles of this argument to the case of treaties, the making of which falls exclusively to the National Government without any limitation as to the subject-matter to be dealt with thereby, it becomes plain that any treaty provision which is entirely unexceptionable save for the fact that it conflicts with a State law, supersedes such State law, no matter by virtue of what uncontroverted power this may originally have been enacted.

Without pressing these considerations further, however, at the present moment, let me recur once more to the Convention of 1787, with this query: Was Marshall's doctrine in the cases we have just been reviewing in general accord with the intention of the framers of the Constitution? Any answer to this question will have an important bearing upon a number of phases of our subject, both immediate and remote.

Marshall's doctrine may be reduced to two closely related propositions: (1) The denial to the States of any rights as against the constitutional powers of the United States; (2) the assertion of a perfect right of entry on the part of the National Government, for the purposes of its constitutional powers, into the States, totally regardless of their favor or disfavor. The most direct evidence upon the first point is to be found in the fate of Sherman's motion, in the Convention on July 17th, that the general legislature should have no power "to interfere with the government of the individual States *in any matters of internal police* which respect the government of such States only, and wherein the general welfare of the United States is not concerned." Considering the careful language in which this motion is couched to save the "general welfare of the United States," its adoption would have left the situation at worst ambiguous, but it was voted down by a vote of eight States against two. Nor is this all; for immediately afterward Bedford of Dela-

ware, who, now that the small States were assured of their equality with the large States in the Senate, was strongly pro-national, moved as follows: that the general legislature have the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Said Randolph, who since the beginning of the Convention had undergone a change of view exactly the opposite to Bedford's: "This is a formidable idea indeed. It involves the power of violating all the laws and constitutions of the States, and of *intermeddling with their police.*" Nevertheless the motion was adopted by a vote of six States to four, and so became the guiding principle of the Committee of Detail which framed the Constitution.[26]

The evidence in support of the second proposition is quite as conclusive though perhaps not so easily statable. It will have been observed that Marshall adduces two considerations in its behalf: (1) The fact that the Constitution was established by an authority superior to any subsisting within the boundaries of any single State, namely, the People of the United States, and (2) the fact that it was the intention of the Framers to render the Government of the United States independent of the States, to convert it, in other words, from a government

[26] Farrand, II, 25-7.

over States to a government acting directly upon individuals. This supposed intention of the Framers is, of course, too clear and too well known to demand further demonstration,[27] but the nature of the authority which *in the estimation of the Framers* ordained and established the Constitution, is still sometimes, despite the language of the Constitution itself, called into question.

The source of difficulty at this point resides, of course, in the fact that the Constitution was referred to conventions in the several States. Seizing upon this fact forty years after the event, Calhoun represented the Constitution as a compact to which the people of each State acceded as a separate sovereign community, each binding itself by its own peculiar ratification.[28] But that *sovereignties* were parties to the constitutional compact was certainly not at all the point of view of the Framers. On the floor of the Convention itself, Johnson of Connecticut had observed that gentlemen were using the term "States" in two senses: "Those on one side considering the States *as districts of people composing one political society;* those on the other, considering them as so many political societies." [29] But that it was to the States in the former sense that the Constitution was referred, there can be no doubt whatever. Such is the explicitly stated view of

[27] "Federalist," No. 15.
[28] George Ticknor Curtis, "Constitutional History of the United States" (1897-1905), II, 17.
[29] June 29, Farrand, I, 461.

both Madison and Hamilton in "The Federalist": "The Constitution is to rest on the assent of the people of America," though this is to be given in the separate States.[30] That the Constitution was to rest upon the ratification of the people of America "given as individuals," rather than on that of the States, furnished Luther Martin one of his strongest arguments against the new system;[31] and this also was the view of Patrick Henry[32] and of Richard Henry Lee, the latter characterizing the Constitution as "the final act," "not of the people of New Hampshire," etc., "but of the people of America."[33] Finally the opposing point of view was met and squarely rejected by Wilson in the Pennsylvania ratifying convention in the following words:

"There can be no compact unless there are more parties than one. . . . 'The Convention were forming compacts!' With whom? . . . I am unable to conceive who the parties could be. The State *governments* make a bargain with one another; that is the doctrine that is endeavored to be established by gentlemen in opposition; their State *sovereignties* wish to be represented! But far other were the ideas of this Convention, and far other are those conveyed in the system itself."[34]

[30] Hamilton, "Federalist," No. 22; Madison, No. 39.
[31] Farrand, III, 172-232; especially 192-3, Secs. 30 and 31.
[32] Elliot, III, 72.
[33] Ford, "Pamphlets on the Constitution," 311.
[34] Farrand, III, 166.

But perhaps the feature of this passage which deserves most especial attention is, not the direct testimony which it offers, but the striking confirmation furnished that testimony by the words in which it is couched. I refer to the use in it of the terms " State governments " and " State sovereignties " as if interchangeable. This circumstance in fact conveys my whole contention with reference to the point under discussion; for, when taken in conjunction with a great mass of similar evidence, it shows that the repository of the State's sovereignty in 1787 was, generally at least, deemed to be the State *government* and *not* the *people* of the State, though the latter were of course, in a government based on the consent of the governed, the *original source* of sovereignty. Thus in referring the Constitution to the " people " within the States, the Convention of 1787, of deliberate calculation, went behind the " State *sovereignties.*" By 1830, however, the significance of terms had altered. Particularly had the developed use of the constitutional convention as a part of the machinery of government within the States given the term " people " a new meaning. And this new meaning gave Calhoun his opportunity. Madison at least appreciated the situation, as is shown by his warning, addressed to his countrymen in 1829, against " those errors which have their source in the changed meaning of words and phrases." The criticism strikes unerringly, even though unintentionally, to the weak spot, not merely

of Calhounism, but of the whole State-rights position.

However, it may be urged that the addition of the Tenth Amendment to the Constitution essentially modified the original intention of that instrument, with reference to the relation of State and national powers. But how can this be? Not only does the Amendment continue to recognize the "people" as distinct from the "States,"—which is the point of view of the original Constitution,—but it gives not the slightest indication of any intention to curtail the operation of the delegated powers of the United States nor yet of its so-called "implied" powers, which, of course, by the terms of Article I, section 8, paragraph 18, are also delegated, though in very general language. The best proof of this is to be found in a candid reading of the Amendment itself, but there is also supporting evidence from the State ratifying conventions, whence the Amendment originated. Thus, Massachusetts proposed the following form: "That it be explicitly declared, that all powers not expressly delegated by the aforesaid constitution, are reserved to the several States, to be by them exercised." [35] Yet along with this resolution went another to the following effect: "That Congress erect no company with exclusive advantages of commerce." [36] Had the former been deemed to limit Congress' implied powers, the latter would have been unnecessary.

[35] Elliot, II, 180.

[36] *Ib.*, 181.

The fact of the matter is that the only thing which the Tenth Amendment was intended to effect was explicit statement of the universal understanding, that the United States was a government of delegated powers and had no *inherent* powers. But even in this respect the original efficacy of the Amendment, as it came from the States, was to some extent curtailed by the elimination of the word "expressly" from it.[87] Hence it has become possible subsequently to contend—and in certain connections the doctrine is to-day indubitably established [88]—that the National Government possesses not only its enumerated powers and those powers which flow therefrom by implication, but also certain powers by virtue of the fact simply of the nationality of the United States. And to this extent perhaps the intention of the Tenth Amendment has been nullified. But it was never the intention of the Tenth Amendment to limit the United States in the exercise of its delegated powers. Wherefore, when a clash arises between the delegated powers of the United States and the reserved powers of a State, in consequence of the effort of the two jurisdictions to control simultaneously the same subject-matter, the constitutional question that arises is adjourned to Article VI, paragraph 2, of the Constitution,

[87] Herman V. Ames, "Amendments to the Constitution," (Amer. Hist. Assoc. Ann. Rep., 1896, Vol. II).

[88] C. J. Marshall, in Amer. Ins. Co. *v.* Canter, 1 Peters 511 (1828); J. Bradley, in Knox *v.* Lee, 12 Wall. 457 (1871).

which, with the utmost explicitness and absolutely without exception, gives the right of way to the national authority.

In a word, it was upon the most impregnable foundations, both historical and logical, that Marshall rested his doctrine of national supremacy. Let us now turn to consider the application of that doctrine to the treaty-power, an event which did not have to await Marshall's accession to the Chief-Justiceship.

CHAPTER IV

THE ORIGINAL VIEW OF THE TREATY-POWER

THE scope allowed the treaty-power under the Articles of Confederation is a matter of especial importance as demonstrating what was meant by that power when the Constitution was framed. In the ninth of these Articles it was defined as follows:

"The United States in Congress assembled shall have the sole and exclusive right and power of . . . entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imports and duties on foreigners as their own people are subjected to or from prohibiting the exportation or importation of any species of goods or commodities whatsoever."

The important feature of this passage is not the declaration it contains of the exclusive nature of the national treaty-power, for that was already guaranteed by the prohibitions of Article VI; it is, instead, the proviso which, by the reservation it notes, argues the contrary general principle. For if it was necessary to safeguard a particular item of the legislative power of the States against prejudice by the treaty-power, what is to be deduced as to the general status

of the former power in relation to the latter? Palpably, its subordination thereto; palpably, that the legislative power of the States is conceived to interpose no bar to the treaty-power.

And this also is the obvious verdict of the practice of this period. Our attention is first drawn to Article XI of the Treaty of Amity with France which was ratified by the Continental Congress, May 4, 1778.[1] By this article it was provided that the "subjects, people, and inhabitants of the United States or any one of them" should not be reputed aliens in France, that they should consequently be exempt from the French *droit d'aubain,* or any similar duty, that they should have the right to dispose in France of their goods movable or immovable, "by testament, donation, or otherwise" in favor of such persons as they chose; that their heirs should "have the right to succeed them *ab intestat,* without being obliged to obtain letters of naturalization" and "without having the effect of this concession contested or impeded under pretexts of any rights or prerogatives of provinces, cities, or private persons"; that such heirs should be exempt from the *droit détraction* and all like duties; and finally that "the subjects of the most Christian King should enjoy on their part, in all the dominions of the said States, an entire and perfect reciprocity in relation to the stipulations contained" in this article, though the United States on their part, and France on its

[1] "Treaties and Conventions," 299-300.

part, still reserved the right to enact such laws as seemed to them proper for the prevention of emigration to their respective dominions. By these sweeping provisions, not only did the treaty-power assume to determine the status of aliens and their property within the several States, but in so doing it traversed the existing laws on the subject of every State in the Union, which at this time were unanimous in denying aliens the right to purchase or hold real property. Undoubtedly it may be asserted, as indeed it has been, that this treaty, antedating, as it does, the Confederacy some two years, was concluded by a revolutionary body, whose acts are devoid of the value of legal precedent. We need not pause to dispute the contention, for even though we allow it, what is to be said of similar provisions in the Treaty of 1782 (Article VI) with the Netherlands,[2] in that of 1783 (Article VI) with Sweden,[3] in that of 1785 (Article X) with Prussia?[4] These were not the work of a revolutionary government at any rate, but of the authority organized and defined by the Articles of Confederation.

And the same is also the case with the Treaty of Peace of 1783,[5] Article IV of which we considered in the previous chapter. But with respect to this

[2] *Ib.*, 751.
[3] *Ib.*, 1043-4.
[4] *Ib.*, 902. In this Treaty the alien heir is subjected with reference to real estate to the local law, but is allowed a reasonable time within which to sell his estate and retire with the proceeds.
[5] *Loc. cit.*, 375-9.

treaty, defenders of State rights have brought forward an entirely different objection. Turning to Article V they make much of the fact that it contains clauses of a merely recommendatory character, clauses in which it was agreed that Congress should *recommend* certain measures to the State legislatures, looking to the restitution to the loyalists of their confiscated estates; and they proceed to argue that this circumstance is evidence of a recognition on the part of the American negotiators of outstanding rights of the States which they were not constitutionally free to invade. But as was well remarked by Justice Cushing, in *Ware v. Hylton:* "It would be hard upon them [the American commissioners] to suppose that they gave up all that they might think they strictly had the right to give up. We may allow somewhat to skill, policy, and fidelity." Moreover, the actual history of the negotiations does not bear out the contention of the States-rights advocates. The American negotiators undoubtedly set forth to the British representatives with commendable frankness that defect of executive power on the part of the Government of the Confederation and its actual dependence upon the States in this respect which plainly counseled that the good faith and zeal of the States should not be put to too trying a test, but as regards the actual constitutional scope of their powers of negotiation they seem not to have had the least doubt in the world. On the contrary, their uniform tone is that of exact equality with their op-

ponents in this reference. Nor does this same Article V itself lack ample proof of this fact; for the above-mentioned agreements "to recommend to the legislatures of the respective States" are interlarded with positive undertakings by the United States, which infer supremacy on the part of the treaty-power over State power to the fullest conceivable extent. Thus it is agreed *positively* that the loyalists "*shall* have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months unmolested in their endeavors to obtain restitution" of their confiscated estates. Further "it is agreed that all persons who have any interest in confiscated lands . . . *shall* meet with no lawful impediment in the prosecution of their just rights"; and finally, in Article VI, "that there *shall* be no future confiscations made" and that "those who may be in confinement" on charges growing out of their connection with the war, "*shall be immediately* set at liberty." What more impressive demonstration could be required of the competence of the treaty-power to regulate relations that would otherwise fall within the province of the States, and to displace State authority in doing so?

Turning from the negotiations of 1782 to the convention of 1787, we find that the record warrants the following assertions:[6] first, that the Con-

[6] Farrand, I, 238, 244, 247, 292; II, 132, 145, 155, 169, 183, 297, 282-3, 389, 392-4, 395, 495, 498, 538, 540-1, 544, 547-9, 574, 599.

vention was a unit upon the proposition to confer the treaty-power upon the Central Government; second, that it was similarly a unit in prohibiting the States from entering into treaties, though it left them the right, with the consent of Congress, to enter into "*agreements*" with each other or with foreign states;[6a] third, that though the proposition was originally resisted, it was finally admitted by all, that treaties should have, at least generally, the operation of law, if the treaty-making body cared to impart to its work such quality and effect; fourth, that the Convention enlarged the treaty-power by sweeping away the restriction in the Articles of Confederation, in favor of State commercial regulations; fifth, that the Convention believed that "treaties made" under the Articles of Confederation and those to be made under the new system, would rest, under the new system, upon the same constitutional basis, namely, that furnished by the Constitution; that the disjunctive terms of the constitutional clause were inserted in place of the original form, which was simply "the treaties made," in order to make it clear that existing treaties would continue opera-

[6a] The term "agreements" is not defined in the "Federalist." "It has been suggested that this clause was intended to enable each State, with the consent of Congress, to make agreements with foreign countries respecting the reciprocal rights of their inhabitants." J. P. Hall, "Constitutional Law" (Chicago, 1910), p. 328, citing 57 *American Law Register*, 435, 528. Admit, however, this conjecture to be well founded, and the fact still remains that the treaty-power was universally deemed, in 1787, to extend to the making of compacts on this same subject of rights of aliens. *Vd. infra.*

tive under the new system; [7] sixth, that all parties in the Convention and all plans introduced into it, recognized the necessity of making treaties paramount to State laws and constitutions, without any exception whatsoever; [8] seventh, that it was specifically asserted and not denied, that the treaty-power would be competent to alienate the territory of the United States, wherever lying, and even to the extent of "dismembering the Union"; that the power, which was at first reserved unqualifiedly to the States, of levying tonnage duties would be controllable none the less by the treaty-power; that while Congress was to be prohibited from laying duties on exports from the States, the treaty-power "could make a treaty requiring" all the exports of a State "to be sent to one particular port." [9] Finally, the record warrants the assertion that it was precisely because the Convention regarded the treaty-power to be vested with such ample power over the interests of the States that it in the end provided that no treaty should be made without the consent of two-thirds of that body in which the States were to be equally represented. At one point and only one, does question arise, and that not because of the limitations set to the treaty-power by the Constitution itself or by the voice of the Convention, but because of a strong implication from both sources exactly to the contrary. The

[7] August 25, Farrand, II, 417.
[8] *Ib.*, III, Appendices C, D, E, and F.
[9] *Ib.*, I, 297, and II, 548-9; II, 625; II, 393.

question may be put this way: did the Convention, in sanctioning the distinction in Article VI of the Constitution, between "*the authority of the United States*" as the basis of the legal obligation of national treaties, and "*pursuance of the Constitution,*" as that of the acts of Congress, mean to convey that the treaty-power was to be regarded as insusceptible of constitutional limitation, and that, therefore, reliance must be had exclusively upon the political checks? Certainly, in the mouths of some, the term "authority of the United States" seemed to signify merely "commission of the United States"; and a belief that this was the whole significance of the term in question furnished the pivot upon which discussion of the treaty-power was to turn in most of the State ratifying conventions.

Such, for example, was plainly the case in the North Carolina convention which rejected the Constitution. Said Mr. Porter:

> "Mr. Chairman, there is a power vested in the Senate and President to make treaties, which shall be the supreme law of the land. *Which among us can call them to account?* . . . They might give up the rivers and territory of the Southern States."

The reference is to the Mississippi territory, concern for which influenced profoundly the discussion of the treaty-power in all the conventions. "Yet," to quote again, "in the preamble of the Constitution, they say *all the people* have done it."[10] The

[10] Elliot, IV, 130.

same argument was made by others. It was answered by Davie, a North Carolina delegate to the federal Convention, thus:

"As the Senate represents the sovereignty of the States, whatever might affect the States in their political capacity, ought to be left to them. This is the certain means of preventing a consolidation. How extremely absurd it is to call that disposition of power a consolidation of the States, *which must to all eternity prevent it!* I have only to add the principle upon which the general convention went. That the power of making treaties could nowhere be so safely lodged as in the President and Senate; and the extreme jealousy subsisting between some of the States, would not admit of it elsewhere." [11]

Here, then, there is no hint of any sort of constitutional limit: and the same deduction is to be made from the utterances of General Pinckney and Rutledge in the South Carolina legislature which called the ratifying convention in that State, asserting the supremacy of all treaties duly entered into over all State laws whatsoever. Rutledge's language suggests further the exact historical nexus between the constitutional provision and the claim of supremacy which he makes even for treaties under the Articles of Confederation, namely this: that it is as a rule for *State judges* primarily that the rule of supremacy is established in the Constitution, wherefore *any deviation* from it would infer a correlative

[11] *Ib.*, 137.

range of authority within which the different States might in the first instance, through their respective courts, continue to exercise the right enjoyed under the Articles of Confederation, of impeding the measures of the Union. But "what sort of power is that," he inquires, "which leaves individuals in full power to reject or approve?" But the treaty-power may be abused, it is objected. "Pray, what solid reasons," Rutledge inquires, "*could be urged to support gentlemen's fears that our new governors would wish to promote measures injurious to their native land?*" [12]

Thus again is the political check alone relied upon. And of similar implication, with reference both to the powers of Congress and the reserved powers of the States, is the Amendment which was proposed by the New York convention:

"Resolved . . . that no treaty ought to operate so as to alter the constitution of any State; nor ought any commercial treaty to operate so as to abrogate any law of the United States." [13]

From the Virginia convention alone, which was particularly concerned upon the Mississippi question, came the idea that the treaty-power was substantially restricted by constitutional limitations in the strict sense of the term. Let us see what those limitations were.[14]

[12] *Ib.*, 261-2.
[13] *Ib.*, II, 383.
[14] The ensuing debate is recorded in Elliot, III, 457-72.

The lead in the debate on this matter in the Virginia convention was taken by Patrick Henry, who in his efforts to alarm the friends of liberty evidently believed that he had found in the undefined character of the treaty-power a most excellent point for attack upon the new system. His contentions may be summed up thus: first, that the treaty-power could "dismember the Empire," by which he meant particularly that it could surrender the Mississippi country; second, that it could sacrifice personal rights and inflict unusual punishments for the violation of treaties; third, that the treaty-power was paramount not only to State laws and constitutions, but also to the acts of Congress and the national Constitution "*and everything.*" For, he inquired, "can anything be paramount to what is paramount?" In fact, the only check upon the treaty-power was, he insisted, that furnished by impeachment,—and what did that amount to? It was "a mere sham, a mere farce!" It followed, therefore, that if the treaty-power left us anything, we should be deeply grateful for the favor shown, "*but they may exercise*" *their power,* "*if they please and as they please.*"

Henry's attack was met by Corbin, Randolph, Madison, and Nicholas. Corbin urged the political check and the check which Congress by its powers would be able to exert. Randolph and Madison, however, took a different line, resting their case, for the most part, upon general principles: to wit, that a grant of power comprises in its very terms a

limitation upon that power, that all power is a trust to be exercised for the ends for which it is bestowed, that no power can be deemed to have been surrendered to be exercised to the derogation of fundamental rights. Randolph phrased the matter thus:

"Will not the President and the Senate be restrained? Being creatures of that Constitution, can they destroy it? Can any particular body, instituted for a particular purpose destroy the existence of the society for whose benefit it is created?"

And Madison's point of view is essentially the same, though at the same time he emphatically refused to specify the objects of the treaty-power, and also showed that he put large confidence in the political check, particularly in the consideration that those who were to regulate transactions with foreign nations would "feel the whole force of national attachment to their country." For the rest, he spoke as follows:

[Pointing out that the *treaty-power under the Constitution was to be the same as under the Articles of Confederation,* he inquired:] "Does it follow, because this power is given to Congress, that it is absolute and unlimited? I do not conceive that power is given to the President and Senate to dismember the Empire or to alienate any great essential right. I do not think the whole legislative authority have this power. *The exercise of the power must be consistent with the object of the delegation.* . . . The object of treaties is

the regulation of intercourse with foreign nations, and is external. *I do not think it possible to enumerate all the cases in which such external regulations would be necessary.* Would it be right to define all the cases in which Congress could exercise this authority? *The definition might and probably would prove defective.* They might be restrained by such a definition, from exercising the authority where it would be essential to the interest and safety of the community. *It is most safe therefore to leave it to be exercised as contingencies arise."*

And, of course, the treaty-power must be supreme over State laws:

"To counteract it by the supremacy of the State laws would bring on the Union the just charge of national perfidy, and involve us in war."

However, the supremacy of the treaty-power to State laws and constitutions did not mean that it could set individual rights ruthlessly at naught:

"I conceive that as far as the bills of rights in the States, do not express anything foreign to the nature of such things, and *express fundamental principles essential to liberty and those privileges which are declared necessary to all free people, these rights are not encroached on by this government."*

It is impossible, I think, fairly to find support in these words of Madison for the State-rights thesis of reserved powers, though this has been done.[15]

[15] Shackelford Miller, in *Amer. Law Rev.*, XLI, 530.

True, Madison asserts that the treaty-power cannot dismember the Empire, but this assertion is not based upon State rights but upon the general principle that power is a trust and may not be abused: and he adds that neither the King of France nor the King of Great Britain can dismember their dominions, or alienate any part of them.[16] Also he uses the phrase, "the whole legislative power." But this does not signify that he regarded the treaty-power as kept within the bounds of the enumerated powers of Congress. What it does signify is that Madison was characterizing the treaty-power as a branch of the legislative-power, though not the whole of it. And, moreover, Madison explicitly refuses to attempt an enumeration of the cases in which the treaty-making power should act. But finally, it appears that he speaks of the "object of treaties" as "*external.*" But that treaties "required an *internal* regulation" sometimes, he is well aware.[17] Furthermore, he has just stated that "as to its extent . . . the power is precisely in the new Constitution, as it is in the Confederation." The truth is that what he had in mind was merely the fact that through the treaty-making power the nation deals with other nations and secures American interests and rights abroad. He *certainly* did not have it in mind to deny that it must and could grant reciprocity at home.

Quite different to the point of view of either

[16] Elliot, III, 458. [17] *Ib.*, 471.

Madison, Randolph, or Corbin, was that set forth by George Nicholas in the words that follow:

"The worthy member says that they can make a treaty, relinquishing our rights, and inflicting punishments; because all treaties are declared paramount to the constitutions and laws of the States. An attentive consideration of this will show the Committee that they can do no such thing. The provision of the sixth article is, that this Constitution and the laws of the United States shall be the supreme law of the land. They can, by this, make no treaty which shall be repugnant to the spirit of the Constitution, *or inconsistent with the delegated powers.* The treaties they make must be under the authority of the United States, to be within this province. It is sufficiently secured, because it only declares that, in pursuance of the power given, they shall be the supreme law of the land, notwithstanding anything in the Constitution or laws of particular States." [18]

The significant feature of this utterance is the identification it effects of "the authority of the United States" with the delegated power of the United States. Of course, if the treaty-power is to be reckoned among these delegated powers, the proposition goes without saying. But in the present case the purpose is to define the treaty-power. Obviously, however, to define the treaty-power by itself were rather futile by-play. The conclusion, therefore, becomes unavoidable that the intention behind the effort to identify "the authority of the United

[18] *Ib.*, 463-4.

States" with the delegated powers of the United States was to reduce the treaty-power from its rank as a substantive power to that of a mere ancillary power, a mode of exercising the *other* delegated powers of the United States. This is the extreme State-rights position with reference to the treaty-power. Nicholas must be accorded the honor of first formulating it.[19]

From the State ratifying conventions, we pass to the Supreme Court. The great leading precedent covering the issues arising from a conflict of treaty provisions with State legislation, though it was preceded shortly in point of time by the inconspicuous case of *Brailsford v. Georgia,*[20] was the case of *Ware v. Hylton,*[21] which was decided by the Court in 1796. The facts and the bearing of the decision are indicated in the syllabus, which runs essentially as follows:

"A debt due before the war from an American to a British subject was during the war paid into the loan office of Virginia in pursuance of a law of that State of the 20th of December, 1777, sequestering British property and providing that such payment, and a receipt therefore, should discharge the debt. 'Held, that the legislature of Virginia,' which 'from the 4th of July, 1776, and before the Confederation of the United States . . . possessed and exercised all the rights of' an individual government, 'had authority to make such law and that the same was obligatory,'

[19] *Vd. infra,* Ch. VI.

[20] 3 Dal. 1 (1794).

[21] 3 Dal. 199 (1796).

since 'every nation at war with another may confiscate all property of, including private debts due, the enemy.' 'Such payment and discharge would' therefore 'be a bar to a subsequent action, unless the creditor's right was revived by the treaty of peace,' by which alone 'the restitution, or compensation for, British property confiscated during the war by any of the United States,' could be provided for. Held, that the fourth article of the Treaty of Peace between Great Britain and the United States of September 3, 1783, nullifies said law of Virginia, destroys the payment made under it, and revives the debt, and gives a right of recovery against the principal debtor, notwithstanding such payment thereof under the authority of State law."

The sweeping character of this decision needs no comment, other than that afforded by the equally sweeping principles upon which it was based. Upon these principles the Court, moreover, was in substantial accord, though Justice Iredell parted company with his brethren, in accepting an interpretation of the treaty by which the word "creditor" of Article IV was made out to be inapplicable to defendant. For the rest, therefore, we may content ourselves with the following passage from the opinion of Justice Chase; which, being the most elaborate of the opinions filed, best reveals the ins and outs of the Court's thinking upon the matter we are interested in:

"it seems to me," Chase wrote, "that treaties made by Congress according to the Confederation, were su-

perior to the laws of the States; because the Confederation made them obligatory on all the States. . . ." But "*if doubts could exist before the establishment of the present national government, they must be entirely removed by the sixth article of the Constitution* which provides 'that all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land.' . . . *There can be no limitation on the power of the people of the United States.* By their authority the State constitutions were made, and by their authority the Constitution of the United States was established; and *they had the power to change or abolish the State constitutions, or to make them yield to the General Government and to treaties made by their authority.* . . . It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the constitution and laws of any individual State; and their will alone is to decide. . . . Four things are apparent on a view of this sixth article of the National Constitution. First, that it is retrospective, and is to be considered in the same light as if the Constitution had been established before the making of the Treaty of 1783; second, *that the constitution or laws of any of the States so far as either of them shall be found contrary to that treaty are by force of the said article, prostrated before the treaty;* third, that consequently the Treaty of 1783 has superior power to the legislature of any State, because *no legislature of any State has any kind of power over the Constitution, which was its creator;* fourth, that it is the declared duty of the State judges to determine any constitution or laws of any State contrary to that treaty (or any other) made under the authority of the United States, null and void. National and federal

judges are bound by duty and oath to the same conduct."

The important lesson enforced by this language is the identity in the minds of the judges of the supremacy of national treaties over State laws and constitutions with the constitutional competence of the treaty-power to deal with the subject-matter of the treaty in question, though otherwise this would have fallen to the States alone to regulate. The point is further enforced by the following passage from Justice Cushing's opinion:

"To effect the object intended" by the treaty, " . . . *there is no want of power, the treaty being sanctioned as the supreme law, by the Constitution of the United States,* which nobody pretends to deny to be paramount and controlling to all State laws, and even State constitutions, wheresoever they interfere or disagree."

But again it is enforced by the whole course of argument taken by defendant's counsel. These gentlemen, who may be presumed to have chosen their ground with some care and insight, *raised the question of the scope of the treaty-power as distinct from that of the supremacy of the treaty in question,* which they urged ought to be considered as of the year 1783 and not of the year 1796, *at only one point:* namely, as to its competence to invade *vested rights,* which they urged it would be doing were the

treaty interpreted to revive the claim against their client. The doctrine of vested rights, however, was hardly afoot at this date, and the argument was scarcely recognized by the judges, save by Iredell, who avoided it by his interpretation of the word "creditor." But even had it been quite otherwise, our general estimate of the significance of the case would have to be the same. For the feature of it which this argument of defendant's counsel but brings into greater prominence, is the universal admission, that so far as State prerogative was concerned, the treaty was indefeasible; that if it was attackable at all, on the score of *validity,* it was because of its operation, not upon State rights but upon private rights.

Of the cases rising subsequently to *Ware v. Hylton* under the Treaty of 1783, the most noteworthy were *Hopkirk v. Bell*[22] and *the Society for the Propagation of the Gospel v. Pawlett.*[23] In the former, American debtors set up the Virginia statute of limitations in bar to recovery by British creditors, but the Court ruled that the operation of the statute in question was stayed in such cases by the treaty. In the latter case the Court ruled that the intervention of the war of 1812 did not deprive the Society of the right to recover property vesting under the earlier treaty. Meantime, a rather different class of cases, but invoking the same under-

[22] 3 Cranch 453; 4 Cranch 163 (1867).
[23] 4 Pet. 480 (1830).

lying constitutional principles, had begun to come up in connection with rights claimed by aliens within the States, under national treaties. The Treaty of 1778 with France was terminated by the brief hostilities of 1798, but the stipulations of Article XI of that treaty were renewed in Article VII of the temporary Convention of 1800,[24] "the most expressive of all precedents, it having passed through the hands and received the approbation of John Adams, John Marshall, Oliver Ellsworth, Thomas Jefferson, and James Madison, who, if anybody, should have understood the Constitution." [25] By Article IX of the Treaty of 1794, moreover, the United States entered into similar engagements with Great Britain. By this article, which stipulated that British subjects at that date holding lands in the territory of the United States and American citizens holding lands in the dominions of his majesty, should "continue to hold them according to the nature and tenure of their respective estates and titles therein" and should be able to "grant, sell, or devise the same" to whom they pleased, "in like manner as if they were natives," and that neither they nor their heirs or assigns should, so far as concerned such lands, and "the legal remedies incident thereto, be regarded as aliens," "all impediment," to quote the characterization of Attorney-General Cushing, "was absolutely

[24] "Treaties and Conventions," 324.
[25] Caleb Cushing, "Eight Opinions of Attorneys General of the U. S.," 411 (1857).

leveled with the ground despite the laws of the States. It is," he continued, "the constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union" again and again.[26]

The leading case in the interpretation of the Treaty of 1794 was that of *Fairfax v. Hunter*,[27] which was decided in 1813, Justice Story speaking for the Court. It is significant that the constitutional aspect of the case attracted only the most casual attention from either court or counsel. The action was one in ejectment, and the whole case was made to turn upon the question whether appellant had been divested of his title by Virginia law as it stood *previous* to the Treaty of 1794, or whether an inquest of office had been necessary. Upon this point Justice Story spoke as follows:

"it was once in the power of the commonwealth of Virginia, by an inquest of office or its equivalent, to have vested the estate completely in itself or its grantees. But it has not so done, and its inchoate title . . . has by the operation of the treaty become ineffectual and void."

The Court thus gave notice of its intention to make no halting or lame construction of rights of aliens under the national treaties, and subsequent decisions only furnish further illustrations of this intention.

[26] *Loc. cit.* [27] 7 Cranch 603 (1813).

Thus in *Craig v. Radford*[28] the rule arrived at in the Fairfax case was reapplied:

"In that case as in this," said the Chief Justice, "the legal title vested in the alien by purchase during the war, and was not divested by any act of Virginia, prior to the Treaty of 1794, which rendered their estates absolute and indefeasible."

So also in the case of *Orr v. Hodgson,*[29] in which the protection of both Article VI of the Treaty of 1783 and of Article IX of the Treaty of 1794 was invoked, it was held as to the latter, that

"It was not necessary for the alien to show that he was in actual possession . . . of the land, at the time of the treaty, because *the treaty applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens.*"

So also in *Hughes v. Edwards*[30] it was held that a mortgagee was protected in his rights by the Treaty of 1794.

And the same disposition is brought by the Court to the interpretation of the French treaties. The leading case here is *Chirac v. Chirac,*[31] in which, to quote the language of a much later decision reviewing it and reapplying the doctrine therein arrived at, the Court held that the Treaty of 1778 gave the citizens of France "the right to purchase and hold

[28] 3 Wheat. 594 (1818).
[29] 4 Wheat. 453 (1819).
[30] 9 Wheat. 489 (1824).
[31] 2 Wheat. 259 (1817).

land in the United States, removed the incapacity of alienage, and *placed them in precisely the same situation as if they had been citizens of this country.*" [32] And the decision quoted from continues, "the State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case." The same remark also applies to the decision in *Carneal v. Banks*,[33] in which Chief-Justice Marshall reiterates his doctrine of the earlier case.

Thus Chief-Justice Marshall and the Court under him, and following its distinguished leadership, the lower federal courts,[34] and the State courts as well,[35] in their interpretation of the treaties securing aliens the rights of citizens found ample opportunity to bring into practical application that doctrine of national supremacy which was discussed in the preceding chapter, namely, the doctrine that national power, within its constitutional scope, displaces all conflicting State authority no matter upon what basis resting. And so matters stood in the year 1832, when the case of *Worcester v. Georgia* [36] came up to the Supreme Court on writ of error from the State supreme court, bringing in its wake a most acrimonious controversy, which, in its ultimate reaches, undoubtedly had not a little influence in

[32] Hauenstein *v.* Lynham, 100 U. S. 483 (1879).
[33] 10 Wheat. 181 (1825).
[34] Butler: "Treaty-Making Power," II, 11-17 (especially footnotes).
[35] *Ib.*, 35-51, footnotes.
[36] 6 Pet. 515 (1832).

giving constitutional law a new direction in the years that were soon to follow. The essential facts of the case were these: Under certain treaties with the Cherokee nation, prior to 1830 the United States had guaranteed that nation exclusive jurisdiction over certain territories lying within the State of Georgia. Notwithstanding these treaties the Georgia legislature, December 22, 1830, had passed a penal enactment prohibiting white persons to reside within the Cherokee territory, without a license from the Governor of Georgia and the taking of an oath of loyalty to the State of Georgia. Plaintiff in error, a missionary from Vermont, residing within the limits of the Cherokee nation by its permission, was, under color of the State act, arrested and sentenced to imprisonment at hard labor for four years. The initial question before the Court was whether the Cherokee nation was the sort of community with which the United States could constitutionally enter into treaty relations. This point being decided in the affirmative, the naked issue was between the treaty and the State law. Denying as it did the jurisdiction of the Supreme Court in the case, defendant State refused to put in an appearance, but the argument by which it justified its course had already been stated by Governor Lumpkin in his message to the State legislature, communicating the writ from the Supreme Court. Quoting the Tenth Amendment, from which he omits the final phrase "or to the people," Lumpkin proceeded thus:

". . . any attempt to infringe the evident right of a State to govern the entire population within its territorial limits and to punish all offenses committed against its laws, within those limits, (due regard being had to the cases expressly excepted by the Constitution of the United States), would be usurpation of a power never granted by the States." [87]

Here unmistakably is the notion of powers positively reserved by the States which the National Government cannot, by what were otherwise a constitutional exercise of its powers, constitutionally invade. It is not surprising that Marshall does not pause to refute this notion. The acts of the State of Georgia involved in the case he simply pronounces "repugnant to the Constitution, laws, and treaties of the United States . . . in direct hostility with treaties, repeated in a succession of years . . . in equal hostility with the acts of Congress . . . giving effect to the treaties" and *therefore void.* Owing to the peculiar position that President Jackson took in this controversy, the Court's order in *Worcester v. Georgia* went unenforced, but this fact has never affected the legal weight of the decision itself.

Turning from the judicial decisions bearing upon the scope of the treaty-power and its relation to State power, to consider more immediately the political practice during the period ensuing upon the

[87] Herman V. Ames, "State Documents on Federal Relations," Doc. No. 60.

adoption of the Constitution, we find that we already have the clue in the treaties heretofore adverted to. But a brief review of other treaty provisions emphasizing the same general lesson will nevertheless not be out of place. I particularly desire to call attention to three species of international agreement that are of most frequent occurrence and in entering upon and enforcing which, the national government distinctly interrupts the territorial jurisdiction of the States in a way that but for its possession of the treaty-power would be impossible.

The first of these is the "*consular convention.*" Our first consular convention was with France and was concluded by none other than the founder of the State-rights school, Thomas Jefferson, in 1788. The general scope of its provisions as touching the internal jurisdiction of the States is indicated by the following summary:

"It authorized French Consuls to administer, in certain cases, upon estates of their deceased countrymen in the several States; to exercise police over all the vessels of their nation in whatever American port they might discharge their functions; to arrest the officers or crews of such vessels; to require the courts"—meaning State courts—"to aid them in the arrest of deserters; and it even elevated them into judges, and authorized them to determine all differences and disputes arising between their countrymen in the United States." [88]

[88] "Treaties and Conventions" (Davis' notes), 1221-2.

Since 1788, the United States has entered into scores of consular conventions, but the essential stipulations of this sort of agreement have always remained the same. In proof of this, I summarize in Chapter VIII the Consular Convention with Greece of 1902.

The second species of agreement that I have in mind is that according aliens rights of residence in the United States in return, of course, for similar rights for American citizens within the territories of the contracting party. The antetype of this sort of agreement is furnished by the Treaty of 1794 with Great Britain.[39] By Article IX of this treaty, as we have already seen, British subjects holding lands in the United States *at the time of the negotiation of the treaty* were to continue to hold them on the same terms as citizens. This was a less liberal provision than that of the Treaty of 1778 with France by which, as construed in *Chirac v. Chirac*, French subjects were free to acquire lands in the United States subsequently to the treaty. And later treaty provisions are generally still less liberal. The usual form is that of Article IX of the Treaty of 1824 with New Granada (Colombia)[40] which, while it provides that, the citizens of each power shall enjoy within the jurisdiction of the other the same rights of control over their *personal property* as if they were citizens, stipulates with reference to *real estate* that if heirs thereto shall be "prevented from entering into the possession of the inheritance,

[39] *Ib.*, 379-94. [40] *Ib.*, 186-94.

on account of their character of aliens, there shall be granted to them the term of three years to dispose of the same, as they may think proper . . . without molestation, and exempt from all rights of detraction." But though this is the usual provision, the earlier very liberal provision of the French Treaty of 1778, which is repeated in the Treaty with Sweden of 1783, is renewed in the treaty with the latter country in 1816 and again in 1827.[41] And other similar recurrences to the earlier type of agreement we shall note from time to time, even during the period when the State-rights doctrine was most dominant.

But there are other lines also along which treaty provisions respecting rights of residence have undergone evolution. Thus, while Article XIV of the Treaty of 1794 accords British subjects the right to resort to the "lands, countries, cities, ports, places, and rivers" of the United States, and "to remain and reside there, without any limitation of time," it is merely with trading purposes in mind. And it is further stipulated that the rights thus reciprocally granted are "*subject always . . . to the laws and statutes of the two countries respectively,*" a provision which, taken literally, at least would not have prevented the several States from imposing all sorts of special burdens upon British subjects in the United States.

[41] *Ib.*, 1057-64: Articles XII and XVII of the two treaties respectively.

The Treaty with Colombia, of 1824, however,—and it is the model for numerous ensuing treaties,—presents a great advance upon the Treaty of 1794, in both these regards. Not only are citizens of the two contracting parties resident within the territories of each other for purposes of trade placed on an equality with the citizens and subjects of the most favored nation, if indeed not on an equality with citizens, "*submitting themselves nevertheless to the laws, decrees, and usages there established, and to which* (sic) *are submitted the subjects and citizens of the most favored nation*," but also it is understood that rights of residence ought to embrace many collateral rights, for which accordingly careful provision is made. Thus Article X of the treaty contains the following stipulations:

"Both the contracting parties promise to engage formally to give their special protection to the persons and property of the citizens of each other of all occupations, who may be in the territories subject to the jurisdiction of the one or the other, transient or dwelling therein, *leaving open and free to them the tribunals of justice for their judicial recourse, on the same terms which are usual and customary with the natives or citizens of the country in which they may be;* for which they may employ in defense of their rights such advocates . . . as they may judge proper in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations

and evidence which may be exhibited in the said trials."

And the ensuing article stipulates for " the most perfect and entire security of conscience " on the part of citizens of either power resident in territories of the other; and guarantees that said citizens shall not be " liable to be disturbed or molested on account of their religious belief, so long as they respect the laws and established usages of the country." " Moreover," it is further provided,

" the bodies of the citizens of one of the contracting parties who may die in the territories of the other shall be buried in the usual burying grounds, or in other decent and suitable places, and shall be protected from violation or disturbance."

The provision here that calls for comment is the one throwing open the courts of justice in the United States to aliens; for, of course, this provision applies primarily, until the National Government shall have assumed exclusive jurisdiction over controversies to which aliens are parties, to the courts of the several States. But its courts are part and parcel of a State's government; and by the prevailing rule of constitutional law, if the *governmental* agencies of a State are subject to this species of control, then *a fortiori* are such *social and economic* agencies as the State may have called into existence in consequence of functions accruing to it subsequently to

the adoption of the Constitution.[42] The exact bearing of these remarks will become plain in the sequel.

Meantime, I would note yet another line of development in connection with the same sort of treaty. From rights of residence for commercial purposes, we pass, in the Treaty of 1849, with Hawaii,[43] to rights of *travel* and residence, "*subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations.*" In the Treaty of 1868 with China[44] the purposes of travel and residence are enumerated as those of "curiosity," "trade," and "*permanent*" residence. Again, in the Treaty of 1887 with Peru,[45] "an unrestrained right of travel" on the part of the citizens of each country, "in any part of the possessions of the other," is stipulated for; and the same degree of security and protection as is enjoyed by *natives* is guaranteed such citizens "*on condition of their submitting to the laws and ordinances there prevailing.*" Finally, the Treaty of 1894 with Japan[46] marks, possibly, yet a further development, which shall be noted in the proper place.

Thus treaties of residence have ordinarily subjected the alien to the police powers of the State,

[42] South Carolina *v.* U. S., 199 U. S. 437.
[43] "Treaties and Conventions," 540-6.
[44] *Ib.*, 179-82.
[45] *Ib.*, 1191-1202, *vd.* 1192.
[46] Malloy, I, 1028-35.

which from an exterior point of view represent merely the municipal rights of legislation of the United States, with this limitation that they shall not be exerted, where equality with citizens of the United States is stipulated for, against aliens as such, or, where equality merely with the subjects or citizens of "the most favored nation" is stipulated for, against a particular nationality.

I pass now to consider the third type of agreement which I had it in mind to discuss, whereby the treaty-power invades the ordinary jurisdiction of the State in a most remarkable manner, and yet the right of the United States in connection with which *has never been challenged.* I refer to extradition agreements, by virtue of which national officers, acting either directly under treaty stipulations, or, as is now invariably the case, under statute based upon treaty stipulations, enter the territory of a State and take therefrom, to hand him over to the other party to the treaty, any person whose case falls within the stipulations of such treaty.

The first agreement of this sort to which the United States was party is to be found embodied in Article XXVII of the Treaty of 1794 with Great Britain, which reads substantially thus:

"It is further agreed that His Majesty and the United States, on mutual requisitions, . . . will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the coun-

tries of the other, provided that this shall be done on such evidence of criminality as, according to the laws of the place, where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed."

Since this date, the United States has entered into scores of such compacts. And the legal basis upon which the power it has thereby assumed over persons has been almost invariably rested is the treaty-power; and it is believed that to-day this is its only recognized basis. Thus, at the very outset of our national history, the question having arisen whether he should surrender a fugitive to a foreign state as a matter of comity, President Washington was advised by Jefferson as follows:

"The delivery of fugitives from one country to another . . . is *in consequence of conventions* settled between them, defining precisely the cases wherein such deliveries shall take place." [47]

True, a different view was expressed by Chancellor Kent, in 1819, in the *Washburn* case,[48] and by Secretary Seward in 1864 in connection with the case of Arguelles,[49] but these utterances are as exceptional as they are exceptionable; and Jefferson's

[47] Moore, "Digest," IV, 246.
[48] 4 Johns. Chan. 106.
[49] Moore IV, 249-50.

statement of the matter is virtually reiterated by the Supreme Court in the recent (1901) case of *Terlinden v. Ames.*[50]

But if the United States is not compelled by its position as a person at International Law to surrender fugitives from countries with which it has no extradition agreements, neither does it possess the power to reach such fugitives by virtue of a special competence surpassing and overreaching the treaty-power. In the *Fong Yue Ting* case the United States Supreme Court established the following doctrine:

> "It is an accepted maxim of International Law, that every sovereign nation has the power, as inherent in its sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the National Government, to which the Constitution has committed the entire control of international relations, in peace as well as in war."

It is, of course, obvious that what is meant by "this power" in the passage just quoted, is not a power antithetical to or different from the treaty-power, which, on the contrary, is but part and parcel of "this power." This is evident on general principles, but even were it not, it speedily becomes

[50] 184 U. S. 270 (1901).

so, when we discover that at the point most essential, from the point of view of the relation of the treaty-power to State power, the treaty-power passes beyond and supplements any general power, arising from the right of self-preservation, of dealing with aliens. For extradition treaties often stipulate generally for the return of fugitives charged with the crimes therein specified, *without distinguishing whether such fugitives be aliens or citizens, in the country of refuge.* Of twenty-nine extradition treaties in force in the United States in 1887, nineteen provided that citizens of the country on which the demand was made should not be obliged to be given up, but the other ten, including the treaties with France, Great Britain, Italy, and Switzerland, contained no such provision. It is true that despite this fact, Italy has on occasion refused to deliver up her subjects and it has been "intimated that France would not surrender one of her own citizens." [51] These circumstances, however, only establish the views of France and Italy, and not those of the United States. Not only has the United States, at times, strongly objected to the insertion of such a clause in treaties under negotiation, yielding the point "only when convinced that treaties could not be concluded . . . on any other basis," but in the recent case of Porter Charlton, in agreeing to surrender a citizen of the United States, fugitive from Italy, it has lived up to the most rigorous view, both

[51] Moore, IV, 287.

of its obligations and its powers under a treaty of extradition.[52]

My general contention is this: that it is by virtue of the treaty-power alone that the United States enters into extradition treaties, and that the usualness of this exercise of the treaty-power should not blind us to the true dimensions of the power thus laid hold upon. Undoubtedly it may be urged that the treaty-power extends to the subject of extradition because that is a proper matter for the treaty-power to deal with; but what is the logical deduction from this contention? Palpably, that the scope of the treaty-power is to be determined not by the reserved powers of the States, but by its own nature.

But with practice and decision before us there remains still one other source of enlightenment as to the established view of the scope of the treaty-power during this period: viz., the great commentators on the Constitution, Kent and Story, both of whose famous works are distinguished, not only by the most comprehensive erudition but also by a certain constructive bent that makes what they have to say at once ratification and reinforcement of the views they espouse.

The older work is that of Kent, and it is significant that it sets forth the broadest possible view of

[52] Charlton's case is at present pending before the Supreme Court. There is little likelihood that the Court will intervene. The question raised by his contention, that the Treaty with Italy has been abrogated by Italy, is undoubtedly a political one.

the treaty-power, namely *that the constitutional obligation of a treaty is identical with its international obligation,* which was also the view of those who resisted the pretensions of the House of Representatives in 1796, in connection with the Jay Treaty. The salient passage from Kent's "Commentaries" is the following:

"The department of the government that is intrusted by the Constitution with the treaty-making power *is competent to bind the national faith in its discretion,* for the power to make treaties of peace must be co-extensive with all the exigencies of the Nation, and necessarily involves in it that portion of the national sovereignty which has the exclusive direction of diplomatic negotiations and contracts with foreign powers. *All treaties made by that power become of absolute efficacy, because they are the supreme law of the land.* There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty." [58]

Story, on the other hand, whose work appeared in the form which it finally received from its author's hands in 1833, presents the treaty-power as a constitutionally limited power, and especially by the outstanding rights of the other branches of the National Government, which in turn was the view of those who espoused the pretensions of the House in 1796. Thus he writes:

[58] 1 Coms. 162.

"The power to make treaties is by the Constitution general, . . . But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the state. A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed therefore in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory and of paramount authority within its scope; and not one embraces a right to annihilate any other. A treaty to change the organization of the government or annihilate its sovereignty or overturn its republican form, or to deprive it of its constitutional powers, would be void, because it would destroy what it is designed merely to fulfill: the will of the people. Whether there are any other restrictions, necessarily growing out of the structure of the government, will remain to be considered whenever the exigency shall arise." [54]

The word "state" in the above passage is used plainly in the generic sense, and Story's whole concern is obviously for the integrity of the coördinate departments of the National Government. With precise reference to the relation of the treaty-power to State laws, he writes in an early section of his treatise thus:

"The peace of the nation and its good faith and moral dignity indispensably require that all State laws shall be subject to the supremacy of treaties with for-

[54] Sec. 1508.

cign nations. . . . It is notorious that treaty stipulations were grossly disregarded by the States under the Confederation . . . *and it would redound to the immortal honor of its* (the Constitution's) *authors if it had done no more than to bring treaties within the sanctuary of justice as laws of supreme obligation."*

CHAPTER V

STATE SOVEREIGNTY AND THE POLICE POWER

BUT even while Kent and Story were summing up the constitutional jurisprudence of their generation, the fundamental doctrine upon which that jurisprudence rested was falling into abeyance, and the notion of the Constitution as an ordinance of the "whole people of America" was being displaced in the minds of the majority of men by the notion of it as a compact of Sovereign States, with the result inevitably of a transformation of the canons of constitutional construction. For the moment this transformation was stayed by the hand of the great Chief Justice, with the assistance of associates who had imbibed from him congenial principles. Between 1835 and 1837, however, the Court underwent a change of personnel that in its completeness and swiftness has not been paralleled even to-day: in that brief period of twenty-seven months, the Court received a new chief justice and five new associate justices.

And with new men, of course, there came new views to the fore. What the general trend of these views would be was foreshadowed at the very mo-

ment the newly constructed court was first coming together, by one who still remained from the old régime but shared to a great extent the point of view of the new. I refer to Justice Henry Baldwin, who in 1837 published his "View of the Constitution" with the major purpose of refuting Story's uncompromising doctrine with reference to the manner in which the Constitution had been ratified. On the one hand, Baldwin, in his brief work, treats Marshall with the utmost reverence, as in some sort a spiritual father; and Marshall's general attitude toward the Constitution he also professes to admire and accept.[1] Marshall's maxims, he says, were two: first, that the Constitution "was designed for immortality"; secondly, that in considering the interpretation of the Constitution, "we must never forget that it is a Constitution we are expounding." Furthermore he contends that "no commentator ever followed the text more faithfully, or ever made a commentary more accordant with its strict intention and language"; that "he never brought into action the powers of his mighty mind to find some meaning in plain words . . . above the comprehension of ordinary minds"; that "he knew the Framers of the Constitution, who were his compatriots," wherefore as its expositor, "he knew its objects, its intentions."

Nevertheless, in the face of all these admissions,

[1] Phila., 1837. The passages below quoted are from pp. 3 and 100-12.

Baldwin rejects the two most fundamental of Marshall's doctrines: first, the doctrine of the ordination of the Constitution by an authority superior to any available within a particular State, the foundation of the doctrine of the supremacy of national power to any conflicting State power; and secondly, the doctrine of implied powers, the logical deduction from the doctrine of the sovereignty of the National Government within its sphere. In lieu of these doctrines, Baldwin offers the following canon of constitutional construction, taken from Article IV, section 3, which confers upon Congress the power to make "rules and regulations respecting the territory or other property of the United States": "and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State." To confine the application of this clause to the matter of land claims merely, Baldwin insists, is a great error; rather it should be regarded as stating a fundamental principle of constitutional construction!

Of course, the practical import of this contention is apparent on the face of it. The "claims" of the United States had not been suffering from Marshall's principles of constitutional construction; it is the "claims" of the States that Baldwin is so solicitous for. And hence the significance of the admission with which he begins his essay: "The history and spirit of the times, past and present, admonish us that *new versions of the Constitution*

will be promulgated to meet the ever varying course of political events or aspirations of power."

To what "aspirations of power" does Baldwin refer? How did these trench upon and modify the established view of the scope of the treaty-power? These are the questions we have to consider in the present and the ensuing chapter.

The idea of the Constitution as a compact of the States was, as we have seen, first broached on the floor of the Pennsylvania ratifying convention, where it was repelled by Wilson most decisively. None the less, five years later the same idea is found to underlie Iredell's dissenting opinion in *Chisholm v. Georgia.* But the source of this dogma as a vital historical force, transforming the canons of constitutional construction, furnishing the fundamental premises of the doctrine of secession, and paralyzing the faculties of the General Government in its initial efforts to deal with secession, is still other. It is the Virginia Resolutions of 1798,[2] the work of James Madison, who ten years earlier had been one of the foremost nationalists of the time. The apology for the Virginia and Kentucky Resolutions must be that they were political in intent and temporary in purpose. The passage of the Alien and Sedition laws had indeed aroused dismay even in the breasts of Federalists. For a moment, however, there was a prospect that the tension would be relieved by a judicial decision against the validity of the ob-

[2] Wm. MacDonald, "Select Documents," 148-60.

noxious measures, but in the case of Callender, the federal judiciary missed its opportunity. In what direction, then, were the friends of liberty, as they esteemed themselves, to turn? If the Federal Convention had one purpose in mind more clearly than any other, it was to get rid of the evil of State intervention.[3] On the other hand, the Convention had left the States strong, in the possession both of the affections of the masses and of large powers of government, and the depositories of these powers were the State legislatures. What more natural, then, than that recourse should be had to these to withstand the "impending tyranny"?

But if the State legislatures were to be opposed to the General Government, some theory must be constructed to warrant the procedure. Certain elements of such a theory were already present in the popular consciousness: for, in vulgar parlance, the States were "sovereign," and to the common understanding, the organ of sovereignty was the *legislature*.[4] Here, then, was a beginning. While the Virginia Resolutions were still in the ink-horn, the canny Jefferson, the Jacob of this transaction, despatched Madison the following specifications for the required batch of constitutional doctrine: "Things should be left," he wrote, "in such a train as that we may not be committed absolutely to push the mat-

[3] "Federalist," 15.

[4] See the correspondence between Madison and Breckenridge of Kentucky on this subject, in Warfield, "Virginia and Kentucky Resolutions."

ter to extremes and yet be free to push as far as events shall make prudent." [5] Madison's response to this order was the Third Virginia Resolution, the essence of which is comprised in the following words:

"Resolved . . . that this assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact to which the States are parties. . . . That in the case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil and for maintaining within their *respective* limits the authorities, rights, and liberties appertaining to them."

Here are two distinct propositions: (1) That the Constitution is a compact among the States, and (2) that the States have a right to judge each for itself (respectively) of dangerous breaches of the Constitution. The latter proposition, though it was to be momentarily brought forward in 1814 in New England and again by Calhoun in 1832, was by its own authors soon discreetly shelved. Being communicated to the sister States, the Resolutions from Virginia and Kentucky drew forth from the Northern legislatures responses which were invariably condemnatory in tone and which usually asserted the

[5] Writings of Jefferson (Ford's ed.), VII, 288.

position of the national judiciary as the final interpreter of the Constitution in the most confident terms.[6] The result was that Madison himself began to seek a retreat from what he better than anybody else knew to be an untenable position. In his famous Report to the Virginia Legislature in 1800,[7] he begins by reiterating the views set forth in the Resolutions of 1798: the States are sovereign,—any decision of the federal judiciary, therefore, while perhaps ultimate in relation to the authority of the other departments of the Federal Government, cannot possibly be thus "in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts." Fifty pages further along, however, his audacity has oozed entirely away. "It has been said," he writes, restating the issue,

"that it belongs to the judiciary of the United States and not the State legislatures to declare the meaning of the federal Constitution. But," he urges in a far different tone to the one with which he set out, "a declaration that proceedings of the Federal Government are not warranted by the Constitution is a novelty neither among the citizens nor among the legislatures of the States . . . nor can the declarations of either . . . be deemed, in any point of view, an assumption of the office of the judge. The declarations in such cases are expressions of opinion, unac-

[6] Ames, State Documents, Nos. 7 to 15.
[7] Writings of Madison (Hunt ed.), VI, 341-406.

companied with any other effect than what they may produce on opinion by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force."

In other words, the boasted faculty of *Interposition* of the State legislature, its right to insert the ægis of its sovereignty between the National Government and such portion of the national citizenship as might chance to reside within the State boundaries, amounts in the last analysis, so far as legal force is concerned, to no more than the fulminations of garrulous hangers-on at a cross-roads post-office.

Unfortunately the mountainous premise which had stood for parent to this ridiculous conclusion was not so easily leveled. Far otherwise, for it still wrapped about the whole brood of secession and civil war. From the very moment that the notion was formulated, and not without vigorous protest from able spokesmen in the Virginia legislature itself for the older view,[8] the doctrine that the Constitution was a compact of sovereign States moved forward to the high plane of the axiomatic in the popular consciousness. True the older view still, for more than a generation, found iteration and reiteration in the decisions of Marshall and Story, in the " Commentaries " of Story and Kent, and finally, and with prodigious force, in the orations of Webster. Nevertheless, the evidence is conclusive that,

[8] Debates on the Virginia Resolutions of 1798 and 1799 (1835), *passim*.

at least from the time of Jackson's election, the newer view had with the generality of Americans in all sections of the country become the dominant one. In the very act of assailing the doctrine of nullification in his famous Proclamation to the People of South Carolina,[9] Jackson accepted the theory of the origin of the Union from which the right of nullification was deduced; and less than a decade later, the apostle of nullification brought the national Senate itself to declare by a vote of thirty-one to thirteen that the Constitution was a compact among State sovereignties.[10]

But with the notion of the Constitution as a compact of sovereign States generally accepted, what consequences ensued for doctrine in the field of Constitutional Law? For the most part, the student of Constitutional Law does not have to take account of the extreme theory of State sovereignty; for the national judiciary never succumbed to that theory, the case of Justice Campbell, whose opinion in the *Dred Scott* case[11] already foreshadows his later action in following his State "out of the Union," being the glaring exception that proves the rule. But the dominant theory neither looked to secession nor did it make the National Government the mere agent of *individual* States. On the contrary, it spoke of the National Government as itself *sovereign*

[9] December 10, 1832. MacDonald, "Documentary Source Book," 333-40.
[10] Benton's Abridgment, XIII, 567-72.
[11] 19 How. 393 (1857).

within the sphere assigned to it. More precisely, this theory that was dominant with the judiciary, and particularly with the Supreme Court from 1837 on, may be summed up thus: (1) The Constitution of the United States rested in each State upon the same basis as the State constitution itself and owed its existence, therefore, as part and parcel of the laws of a particular State to an exertion of the sovereign right of self-government by the people of that State, exercised, however, in this instance, once for all time.[12] From the point of view of constitutional origin, therefore, the government of a State was of equal dignity with that of the United States. (2) Sovereignty in the United States was divided between two centers, the States and the National Government, both of which operated over a common territory and a common citizenship[13] for distinct purposes; each of which was completely equipped with the organs necessary for the discharge of its functions[14] and neither of which was dependent upon or subordinate to the other, save in one particular which did not alter the theory of the system. For while an organ of the National Government, the Supreme Court, construed the Constitution finally, yet it did so under the Constitution which recognized the sovereignty and independence

[12] Such was Madison's later idea; Curtis, "Constitutional History," II, 5.

[13] Ch. J. Taney's opinion in Scott *v.* Sanford; same in Ableman *v.* Booth, 21 How. 506 (1858).

[14] Prigg *v.* Pennsylvania, 16 Pet. 539 (1842); Kentucky *v.* Dennison, 24 Howard 66 (1861).

of the States within the range of their powers.[15] (3) The Constitution, in other words, contemplated the co-existence of these two centers of authority, these twin depositories of sovereignty, whence it followed that neither could assume to control the other to any extent or assume to exercise any power, which, if abused, would hamper or menace the independence and efficiency of the other. In *McCulloch v. Maryland* Marshall had, as we have seen, established the rule, upon the basis of the doctrine of national supremacy, that a State could not tax an agency of the National Government. The Court after Taney established the converse rule upon the basis of the doctrine just stated, namely, of the duality of the federal system, and the general principle inferred therefrom, that each of the two centers must live and let live.[16] In the last analysis the two rules are contradictory, for if the National Government's implied power to charter banks is paramount to the States' power of taxation, why, then, should not its express power of taxation be paramount to any State power whatever? (4) In apportioning the sum total of governmental power between the two centers, the guiding principle of the Constitution was to make the National Government sovereign in the field of external relations, and to leave the States sovereign in the field of internal

[15] Ableman *v.* Booth; Field in Tarble's case. 13 Wall. 397 (1871).
[16] J. Nelson in Collector *v.* Day, 11 Wall. 113 (1870).

relations,[17] whence it followed that any attempt on the part of the National Government to exercise the powers delegated it in a fashion to involve disturbance with the internal relations established by the States, was to be regarded as at best suspicionable. The branch of national power most likely to conduct the General Government into the interior of the States, so to say, was its power to regulate interstate commerce. The clause of the Constitution, therefore, which bestows this power, though part and parcel with the clause respecting the regulation of foreign commerce, was held to intend "a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." [18] Similarly the power of the National Government to construct roads and canals, under warrant of this clause, though originally conceded without qualification of any sort, came, as early as Jefferson's administration, to be subject to the necessity of the National Government's obtaining the consent of the States wherein such roads or canals were to lie.[19] More generally, as, of course, goes without saying, the doctrine of implied powers was pared down at every angle where it projected into the sphere of power theoretically belonging to the States. In the language of Justice Daniel, in

[17] Iredell's opinion in Chisholm *v.* Georgia, Ch. IV, *supra.*
[18] Writings of James Madison (1865), IV, 14-15.
[19] David Walter Brown, "Commercial Power of Congress," (New York, 1910), 241-68.

the *Passenger* cases, "the necessary, auxiliary powers vested by Article I, section 8 of the Constitution cannot be correctly interpreted as conferring powers which in their own nature are originally independent, substantive powers." By the same token, the doctrine tended to establish itself that the National Government had only such powers as are "expressly" delegated it,[20] while the powers spoken of in the Tenth Amendment as "reserved *to* the States" were now conceived of as positively reserved *by* them and as comprising a fund of power not subject to intrusion from constitutional exercise of power by the National Government.

Perhaps this body of doctrine can be best summed up by saying that it represents a disposition to substitute for Marshall's principle of national supremacy the principle of the equal sovereignty of the States and the United States, and to confine the sovereignty of the latter to the outer rim of the country,—in other words, to withdraw from it its attributes of a territorial sovereign. Even as thus stated, the complexity of this system of constitutional doctrine, as compared with Marshall's clean-cut tenets, is apparent enough. In the application of its multiple canons to concrete instances there was apt, therefore, to be a wide diversity of opinion among those who nominally subscribed to the same general principles. It thus happens that the Supreme Court has never been so divided, and that even when united,

[20] 7 How. 283, 496.

its individual members have never been so prolific of individual opinions, as under Taney. This circumstance has been attributed by some to a supposed deficiency in will and the character of leadership of Marshall's successor, but it is due rather to the puzzling complications of the elaborate machinery of exegesis which the Court was attempting to handle.

But how explain the coming to domination of the State-rights doctrine? State sovereignty is an abstract concept—what were the realities behind it? On the one hand, of course, there was the alertness of the South to the special necessities of its "peculiar institution"; and its poignant awareness from the time of the Missouri Compromise that it was a minority section. But, on the other hand, it has to be admitted that the doctrine of State sovereignty was by no means the exclusive property of any section of the country; that in all sections, it bore, to a greater or less extent, the character of a hard defensive shell, so to say, wrapping about the really vital substance of power in actual and, according to the lights of the day, beneficial use: I refer to the "*police power.*" Our task for the moment, therefore, is to sketch briefly the rise of the police power as a leading concept of Constitutional Law and then its safe ensconcing behind the concept of State sovereignty.

The first point to be made is that the doctrine of the police power arose quite independently of the

doctrine of State sovereignty; that its initial reference was not to the too aggressive nationalism of federalism, but to federalism's equally aggressive individualism, particularly on the side of concern for the security of property in a republican government. In this aspect of the matter, the leading doctrine of Constitutional Law during the first generation of our national history was the doctrine of "*vested rights*," under warrant of which the courts treated any legislative enactment unduly infringing upon property rights without making compensation to the owners, as utterly beyond the purview of legislative power, even though not specifically inhibited by the letter of the written constitution.[21] This doctrine, at first set forth in mere dicta, soon found wide acceptation, having marked effect on other concepts of Constitutional Law. It was on this basis that Kent established the doctrine that the power of eminent domain could be exercised for a public purpose only, that is, for a purpose judged by the courts to be public, and the further doctrine that in exercising the power of eminent domain the State must make compensation not only for the property actually taken, but also for incidental damages accruing to adjoining property.[22] Upon the same foundation, too, it is, that Marshall's doc-

[21] See Van Horne *v.* Dorrance, 2 Dal. 309 (1795), Calder *v.* Bull, 3 Dal. 386 (1798), Dash *v.* Van Kleek, 7 Johns. (N. Y.) 498 (1811).

[22] Gardner *v.* Newburgh, 2 Johns. Chan. (N. Y.) 162 (1819).

trine in the *Dartmouth College* case [23] ultimately rests.

From the early twenties, however, the political atmosphere in which the State judiciaries, a growing number of them holding under limited tenures, lived and wrought, began to undergo great changes. With the advance of democracy of the Jacksonian type, the political philosophy that became dominant regarded the written constitution as owing its binding force, not to any supposed relation to fundamental rights but exclusively to its character as the direct enactment of the sovereign people, of whom, furthermore, the legislature, rather than the courts, comprised the immediate representatives. More momentous still, there arose at this moment two important groups of problems with which, in the existing state of public opinion, it must necessarily fall to the State legislatures to deal: problems, namely, of transportation and problems of reform. From 1825, with the auspicious opening of the Erie Canal, every State government became bent upon constructing a system of roads and canals. True, with the panic of 1837, most of such enterprises came to grief, with the result of the State's handing that sort of business over to private capital. This abdication on the State's part, however, curiously enough, instead of diminishing the accumulating stress upon the existing canons of Constitutional

[23] 4 Wheat. 518 (1819), preceded by Fletcher *v.* Peck, 6 Cranch 87 (1810).

Law, contributed to increase it. For private capital organized itself into corporations, which the State was asked to charter, to endow with the power of eminent domain, and finally to control in the general interest. And equally exigent was the demand of the reformer, with a "whole budget of revolutions under his arm." Of particular importance from our point of view was the sweep of anti-liquor legislation across the country in the decade between 1846 and 1856. Ruthlessly destructive as it was of existing values, nothing could have been more reprehensible from the standpoint of the doctrine of vested rights than this type of legislation. Nevertheless in the great majority of the States, the courts upheld it, as they did also legislation vesting private corporations with the power of eminent domain, and legislation regulating such corporations. And the ground upon which the courts took up their position was the doctrine of the police power, the doctrine, namely, of the *right of the State legislature to take such action as it saw fit in the furtherance of the security, morality, and general welfare of the community, save only as it was prevented from exercising its discretion by very specific restrictions in the written constitution.*[24]

Thus was the Doctrine of the Police Power writ-

[24] See Goddard *v.* Jacksonville, 15 Ill. 589 (1854); State *v.* Gallagher, 4 Gibbs (Mich.) 244 (1856); State *v.* Keeran, 5 R. I. 497 (1858); Thorpe *v.* Rutland, etc., R. R. Co., 27 Vt. 140 (1854); Commonwealth *v.* Alger, 7 Cush. (Mass.) 53 (1851).

ten into the State constitution by the State judiciaries: to write it into the national Constitution in the phraseology of State sovereignty, was to be the work of the Supreme Court of the United States under Chief-Justice Taney. And indeed the decisive first step in this direction was taken at the very moment Taney was assuming his seat, to wit, in the case of *Miln v. New York*,[25] which was decided but a few months after Marshall's death. The question at issue in this case was whether a statute establishing an inspection of immigrants from abroad was to be regarded as an attempt on the part of the enacting State to regulate foreign commerce, which, according to complainant's contention, fell exclusively within the power of Congress, or as an exercise of its police powers. The court, speaking through Justice Barbour, upheld the act as an exercise by the State of its power of police, which, at least in certain of its phases, it treats as a positively reserved power, not susceptible of limitation or intrusion by a constitutional exercise of national power. Contending in the first instance, that Congress' power to regulate commerce was not an exclusive power and that, therefore, the State act in question, even though a regulation of commerce, would be valid did it not conflict with actual legislation by Congress, Justice Barbour proceeds next to occupy the real ground of the decision:

[25] 11 Pet. 102 (1837).

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject or the manner of its exercise is not surrendered or restrained, in the manner just stated. *That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained, and that consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive.*"

Justice Baldwin's concurring opinion also brings forward the same point of view:

"By inherent original right, as a single sovereign power, each State has the exclusive and absolute right of regulating its internal police. . . . If it is doubted whether the power (in any particular case) is granted, or prohibited, or *reserved,* then by the settled rules . . . of this court its decision must be in favor of the State law."[26]

[26] View, 189, 196-7.

Naturally the implications of this type of doctrine did not escape the attention of the sole surviving exponent of the older point of view and both in *Miln v. New York* and *Briscoe v. the Bank of Kentucky*,[27] both of which cases had been originally argued before Marshall, who had condemned the State laws involved, Justice Story filed almost passionate dissents, in which he testified to his "profound reverence and affection for the dead" and to the solidity of the grounds upon which his departed mentor had rested "his exposition of the Constitution." More noteworthy still, however, is Story's dissent in the *Charles River Bridge* case,[28] the decision in which was rested by Chief-Justice Taney upon the rule that "in public grants nothing passes by implication." But, as Story keenly points out, upon this basis the *Dartmouth College* decision would have been impossible, since the perpetuity of the charter involved in that case was by mere implication. What Story's criticism brings out is the fact that the Court is acting in this case in flat defiance of the reasonable logic of established precedent. But indeed the Court hardly claims the justification of precedent. Rather it turns to the general constitutional jurisprudence of the day, from which it finds pressed upon it, with almost irresistible insistence, a canon of constitutional construction that at the time of the *Dartmouth College* decision had as yet been hardly formulated. And what that canon

[27] 11 Pet. 257 (1837). [28] *Ib.*, 420 (1837).

was is indicated in the following words from Chief-Justice Taney's opinion:

"The object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. . . . We cannot deal thus with the rights reserved to the States and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well-being and prosperity." [29]

But if the doctrine of the police power, or more accurately, the doctrine of powers reserved by the States for the purposes of their internal police and exercisable at their sovereign discretion, was potent to effect so much, why not more? If it could secure to a State the right to endow a bank of its own creation with power to issue notes that it was prohibited to issue directly; if it could save a State in defeating the reasonable expectations of a franchise from constitutional condemnation; if, in the face of the commerce clause, it could enable a State to inspect aliens entering the country, and, as was ruled in the later *License* cases,[30] to regulate the

[29] See George W. Biddle in "Constitutional History of the United States as Seen in the Development of American Law" (T. M. Cooley, editor).

[30] 5 How. 504 (1847).

sale in the original package of liquor introduced into it in the course of trade from another State,— if it could thus modify or set aside, if not precedents, yet what were precedents by fair analogy, in what way would it be likely to affect the established doctrine with reference to the treaty-power, if the two should come into conflict? [81]

Before we can consider this question in the light of utterances of the Court, we need to review some less formal evidence.

[81] On the development of the Police Power, *vd.* W. G. Hastings, in "Proceedings of American Philosophical Society," XXXIX, 359 ff.

CHAPTER VI

TREATY-POWER VERSUS POLICE POWER

THE State-rights view of the treaty-power may be formulated in either of three ways. By the first, the "authority of the United States," by virtue of which treaties are made, is identified with the sum total of the enumerated powers of the United States, exclusive of the treaty-power, which thus becomes but a method of exercising those powers. This, it will be remembered, was apparently Nicholas' position in the Virginia ratifying convention. But the same view of the subject is stated yet more explicitly in the following quaint passage from a report, by Archer of Virginia, from the Senate Committee of Foreign Relations in February, 1845:

"The treaty-making power can never have capacity of exertion unless in the cases in which its aid is invoked by some one of the expressed powers to carry out the purpose which being of external relation, the powers of domestic sphere of operation would be unable for that reason to reach without the aid of this power of exterior operation. The treaty-making power, under this construction, can never be any other than subsidiary—is never a power independent in its vocation, *however it is so in its name and structure.* It is the hand-maid—waits on the occasions of the

other powers; and though in no posture to receive orders from them, it never yet moves to its exertion save in subordination to their desires." [1]

The second way of putting the matter is from the point of view of State power, and this is the way in which Jefferson, erstwhile champion of the supremacy of treaties under the Articles of Confederation, attacks the subject in his famous Manual of Parliamentary Practice, which he compiled while he was Vice-President. "By the Constitution of the United States," he writes,

"this department of legislation is confined to two branches only of the ordinary legislature, the President originating and the Senate having a negative. To what subjects this power extends has not been defined in detail by the Constitution nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract. . . . (2) By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and cannot be otherwise regulated. (3) *It must have meant to except out of this the rights reserved to the States: for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way.* (4) And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last is denied by some on the ground that it

[1] Sen. Doc. No. 231, 56th Cong., 2d Sess., VI, 82.

would leave very little matter for the treaty-power to work on. The less the better, say others."[2]

The great difficulty attaching to this view of the scope of the treaty-power, Article VI, paragraph 2 aside, is of course historical. For the fact of the matter is that this power has repeatedly passed beyond the domain otherwise assigned to the National Government and has as often invaded the field of power otherwise left with the States. But there is also a logical difficulty that presents itself not heretofore brought out. For if the legislative power of the States opposes a barrier to the treaty-power, then, certainly, the legislative powers of Congress must also oppose such a barrier, since even by State-rights principles, Congress, within the range of its powers, is constitutionally the equal of the State legislatures. That this was seen by Jefferson is evident from the above quotation from his Manual. That it was also seen by Archer is proved by a second report of his almost exactly contemporaneous with the one from which the above extract was taken, a report in which he took the position that the treaty-power could not effect a reciprocity arrangement without the sanction of Congress. But admit all this, and what field is left within which the treaty-power may operate independently? "The less the better," remarks Jefferson. But this flippancy hardly meets the situation. For if there is no field within which

[2] "Manual" (1876), 110.

the treaty-power can operate independently, what becomes of the constitutional designation of treaties as part of "the law of the land"? It would seem to be wholly gratuitous.

The third view is formally less rigorously restrictive of the treaty-power than the views just stated but is for that very reason perhaps the more objectionable. This view rests upon the notion that the States possess certain *inalienable rights, rights which therefore they never have alienated to any extent.* In the exercise of these rights accordingly they cannot be impeded by any exercise of its powers by the National Government that is constitutional. This view calls forth the following criticisms. In the first place it infers logically the doctrine of secession as a constitutional right of a State one of whose inalienable rights has been violated. In the second place, as we shall see presently, no single item of this sacrosanct group of State prerogatives has ever been vindicated as against the treaty-power in authoritative judicial decision. In the third place, the notion remains an utterly illogical one until some principle of distinction is formulated between the consecrated powers and the other reserved powers of a State. Finally, the logical impulse is always operative toward the extreme position, a point which will also appear from the review below of certain judicial utterances.[3]

But let us turn to the first practical application

[3] *Vd.* 5 Sawyer 566 (1879).

of the State-rights view. In 1823 the legislature of South Carolina, being suddenly overtaken with one of its periodic seizures of terror of a slave insurrection, passed an act "the more effectually to prohibit free negroes and persons of color from entering into" the State, the second section of which provided that in case any vessel arriving in a port of the State from any other State or *foreign port,* should have on board, in its employment, any free negro, it should be "the duty of the sheriff of the district" immediately to apprehend such person "and to confine him closely in jail" until the departure of the vessel, when, upon the payment of the expenses of his detention, the negro should be restored to his captain. The enforcement of this measure against a British seaman of color at once provoked a protest from Great Britain, based upon the Commercial Convention of 1815. At first an effort seems to have been made by the National Government to arrive at some understanding with the State authorities that would remove Great Britain's grievance, but a dispute arising between the national and State authorities as to what had been agreed upon, an application was entered with the United States court sitting at Charleston for a writ of *habeas corpus* in behalf of Henry Elkinson, a British subject who had been imprisoned under the act.

Fortunately Justice William Johnson, himself a native of South Carolina, was at this moment on circuit. Consequently the constitutional issue raised

is treated with competence, albeit with a degree of justifiable impatience. "On the unconstitutionality of the law under which this man is confined," runs Justice Johnson's opinion,

"it is not too much to say that it will not bear argument; and I feel myself sanctioned in using this strong language, from considering the course of reasoning by which it has been defended. Neither of the gentlemen has attempted to prove that the power therein assumed by the State can be exercised without clashing with the general powers of the United States to regulate commerce; but they have both strenuously contended that, *ex necessitate,* it was a power which the State must and would exercise; and indeed, Mr. Holmes concluded his argument with the declaration that, if a dissolution of the Union must be the alternative, he was ready to meet it. Nor did the argument of Colonel Hunt deviate at all from the same course. Giving it in the language of his own summary, it was this: *South Carolina was a sovereign State when she adopted the Constitution—a sovereign State cannot surrender a right of vital importance: South Carolina, therefore, either did not surrender this right, or still possesses the power to resume it; and whether it is necessary or when it is necessary to resume it, she is herself the sovereign judge.*"

This argument Justice Johnson does not pause to refute: his mere statement of it seems to him sufficient to display its error. For this was only 1823, and some years were still to elapse ere Calhoun should go over to the State-rights contingent. Justice Johnson accordingly has no hesitancy about

grounding his case exclusively upon the language of "the Constitution of the United States—the most wonderful instrument ever drawn by the hand of man," wherein "is a comprehension and precision that is unparalleled," wherein, after a lifetime of study, one may "still daily find some new excellence." But by the terms of this instrument, the acts of Congress regulating commerce and the treaties of the United States are the supreme law of the land. This supremacy inheres in the Treaty of 1815 with Great Britain:

"A reciprocal liberty of commerce is expressly stipulated for and conceded by that treaty; to this the rights of navigating their ships in their own way, and particularly by their own subjects, is necessarily incident. If policy requires any restriction of this right, with regard to a particular class of the subjects of either contracting party, *it must be introduced by treaty.* The opposite party cannot introduce it by a legislative act of his own. Such a law as this could not be passed, even by the General Government, without furnishing a just cause of war."

At the end, however, Justice Johnson finds himself unauthorized by the act of Congress, the Judiciary Act of 1789, to grant applicant anything better than a writ *de homine replegiando,* in the circumstances a worthless remedy. Writing some months later to the Secretary of State, John Quincy Adams, Justice Johnson shows how, though "the eyes of the community are turned most particularly to the

judges of the Supreme Court for protection of their constitutional rights," the judges are in fact destitute of the necessary power. "Both the writs of *habeas corpus* and injunction I am precluded from using, because the cases assume the form of State prosecutions; and, if I could issue them, I have nobody to call upon," since the district attorney and other federal officers countenance the State measures, and this notwithstanding the fact that no real occasion justified these measures to the least degree. "A few timid and precipitate men managed to disseminate their fears and their feelings, and you know that popular panics spread with the expansive force of vapor. The rest of the State, I am well persuaded, takes no interest in these" acts.

There now ensued, apparently, some further attempts at negotiation by the Administration with the State authorities, but the futility of this course of proceeding was soon proved, not only by a fresh aggression against a British subject but also by the spread of this sort of legislation to other States. Moreover, the national Executive itself began to waver in its adherence to the national point of view. In 1824, Attorney-General Wirt, though of the State-rights persuasion in general, had pronounced these Negro Seamen's acts void, but in his Opinion of March 25, 1831, Berrien, President Jackson's Attorney-General, took precisely the opposite stand, and in the course of his argument, he also took occasion to insinuate the view that a State could regulate

the terms of alien land-holding within its borders, treaty provisions to the contrary notwithstanding.

The thing that finally brought South Carolina and her neighbors to a more sober view of their rights and obligations under the Constitution was, of course, the final outcome of the Nullification movement in Jackson's Proclamation of December 10, 1832, and the Force Bill of the following February. The national authority had vindicated itself in one instance, why should it not in another? At any rate, from 1833 on there seems to have been no further effort on the part of any of the Southern States to enforce their Negro Seamen's acts against the subjects of foreign states. These acts still remained on the statute books and were occasionally enforced against free persons of color from the New England States. The result was that in 1843 the old controversy was renewed on the floors of Congress. On the one hand, it was contended that the legislation in question contravened Article IV, section 2, of the Constitution, but, on the other hand, it was answered, some fourteen years before Taney's opinion in *Scott v. Sanford,* that a negro could not possibly attain State citizenship within the understanding of the Constitution. On all hands, however, it was testified, that these statutes were no longer enforced against aliens.[4]

Meantime another controversy, involving, at base, the same constitutional issue, had also been brought

[4] Rep. No. 80, Reports of Coms., 27th Cong., 3d Sess.

to a settlement. This was the controversy with Great Britain over the Northeastern boundary, which dated indeed from the Treaty of 1783 but which became a matter for really serious concern only during Jackson's administration. It was the assumption of the Treaty of 1783 that its terms demarked this boundary, but the verdict was soon reached by most that, granting this to be the case, they did so "too imperfectly to be susceptible of execution." In his October message of 1803 accordingly Jefferson, bespeaking for the two governments their recognition of this fact, announced that a convention had been entered into "for a practicable demarcation of those limits to the satisfaction of both parties." [5] The significance of this announcement consists in the circumstance that though ten years earlier, when Secretary of State, Jefferson had expressed the view, vigorously opposed by Hamilton, that "the right to alienate even an inch of the territory of any State did not belong to the Central Government," [6] he is now proposing an arrangement that, with reference to the State of Massachusetts, involved just such assumption of right. A generation later, however, far different views were to prevail. The territory involved was now a part of the State of Maine, though some of it still comprised public lands of the State of Massachusetts.

[5] Richardson, "Messages and Papers of the Presidents," I, 359.

[6] Writings (Ford's ed.), V, 476. For Hamilton's view see *ib.*, 443.

With the former State, in 1832, an agreement or "treaty" was entered into by Livingston, and two other representatives of the United States, providing that the legislature of Maine should surrender provisionally to the United States certain territory in return for which it was to be indemnified by certain other territory. Fortunately this ridiculous agreement was never ratified, "nor did the fact that it was concluded become public until long after the proposed transaction had failed." [7]

Another chapter in the history of this long-standing controversy was added six years later. That year, Edward Everett, then Governor of Massachusetts, confidentially asked the opinion of Justice Story concerning a resolution of the Massachusetts legislature which had been presented to him for signature, declaring that no power delegated by the Constitution to the United States authorized the National Government to cede to a foreign nation any territory lying within the limits of the Union. Story replied at once that he could not admit such a proposition, since such cession might be indispensable to the purchase of peace, or of a nature calculated for the safety of both nations, or be an equivalent for a like cession on the other side. He also cited a conversation with Chief-Justice Marshall on the subject, in which the latter had expressed himself "unequivocally of the opinion that the treaty-making power did extend to cases of cession of ter-

[7] Moore, V, 172-3.

ritory, though he would not undertake to say that it could extend to all cases." [8] Two years later, in deciding *Lattimer v. Poteet*,[9] Justice McLean took occasion to express himself upon the same point and to the same effect:

"It is a sound principle of national law," he wrote, "and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the Government within its constitutional powers, neither the rights of a State nor those of an individual can be interposed."

In 1842 the sixty-year-old controversy was finally disposed of by the Webster-Ashburton Treaty. In his official correspondence leading up to the final compromise, Webster, then Secretary of State, apparently took the Maine-Massachusetts view that the United States could not cede any part of the territory of a State without such State's consent. This must have been for mere purposes of argument, however, since in his personal correspondence he took quite a different tone, writing Governor Kent of Maine, in a letter marked "private," thus:

"The negotiations for a convention to settle the boundary question can hardly be said to have made

[8] *Ib.*, 173. [9] 14 Pet. 4 (1840).

any positive progress since last year. . . . The interests of both parties undoubtedly required a compromise and I have no doubt that the position which Maine has assumed is the only obstacle to bringing such a compromise about. The English Government cannot treat with us about a compromise, unless we say we have authority to consummate what we agree to; and although I entertain not the slightest doubt of the just authority of the government to settle this question by compromise, as well as in any other way, yet in the present position of affairs, I suppose it will not be prudent to stir, in the direction of compromise, without the consent of Maine." [10]

In Article V of the Webster-Ashburton Treaty it is stipulated that the Government of the United States shall pay the States of Maine and Massachusetts certain moneys, " in equal moieties, on account of their assent to boundary limits described in this treaty." [11] The State-rights view thus finally prevailed, and it is due to this precedent doubtless that the doctrine that the United States cannot cede the territory lying within a State without the State's consent, still finds its way occasionally into judicial dicta.[12] Such utterances, it is submitted, are displaced fossils, protruding from a lower stratum of constitutional doctrine into an entirely alien soil. For nowadays, in con-

[10] Moore, V, 174. See also Chan. Kent's Views in Butler, II, 391.

[11] " Treaties and Conventions," 435-6.

[12] J. Field in Geofroy *v.* Riggs, U. S. 258 (1890); J. White in Downes *v.* Bidwell, 182 U. S. 244 (1901); but J. White finally substitutes the consent of Congress for State consent.

sequence particularly of the Civil War, the doctrine is once more established that the National Government exists within the States of its own right, and without any possibility of their inserting themselves between it and its citizens and subjects; that, in other words, it is as completely sovereign within the State boundaries for the prosecution of its powers as are the States for the prosecution of theirs, to which, moreover, in case of conflict it is paramount. Moreover, this point occurs: if the National Government were not a sovereign government in the making of treaties of cession, how could the consent of individual States make it so? The Constitution recognizes no such faculty on the part of the individual States of delegating power to the National Government, save in one particular, carefully specified, and by general constitutional principles such delegation is peremptorily forbidden.[13]

But port bills and treaties of cession aside, what is the verdict of practice during this period upon the point at issue?[14] During this entire period, as earlier, treaties continued to assure for consuls their regular immunities from local jurisdiction, their immunity, when not citizens of the United States, from taxation except upon real estate and personal investments, their exemption from the duty of rendering

[13] See particularly J. Curtis's argument in Cooley *v.* Board of Wardens, 12 How. 299 (1851); *cf.* C. J. Fuller in Rahrer's case, 140 U. S. 545 (1891).

[14] See Index to Treaties and Conventions, under "Consuls," "Real Estate," and "Reciprocal Privileges."

testimony in court in person, the inviolability of their archives from any sort of judicial process whatsoever; further their right to assume jurisdiction over disputes arising between masters and sailors of vessels of their respective countries when such disputes did not involve the peace of the port; again their right to apply to the local authorities for assistance in securing the arrest and detention of deserters; and finally, frequently their right to intervene in the case of death of citizens or subjects of their respective countries, to make inventory of the property of the deceased and to take other steps looking to the safe transmission thereof to the rightful heirs. Treaties of the same period also assured aliens rights of sojourn, travel, residence, and trade, subject to the *ordinary laws* and on an equality with citizens of the United States or of citizens or subjects of the most favored nation, guaranteed them freedom of religion and rights of burial, and covenanted freedom of access to the courts of justice on an exact equality with citizens. They also assured aliens the most unqualified rights of acquiring, passing, willing, inheriting, and disposing of personal property, on an equality with citizens, and in the case of their inheriting real estate, where the local laws made alienage a bar to their succeeding, a reasonable term to dispose of such real estate to whom they chose; and in four instances the earlier type of treaty provision was recurred to and aliens were guaranteed the right of succession to real estate as

well as personal estate, on an equality with citizens.[15] It was also a period when a great number of extradition treaties were negotiated, covering progressively an ever wider range of offenses. Finally, there are several new provisions of noteworthy importance with reference to the recognized scope of the treaty-power that appear in treaties of this period.

The Treaty of 1849 with Hawaii and its special importance, I have already spoken of. The Treaty of 1837 with Greece made what was potentially at least a most serious inroad upon the State quarantines, stipulating that any vessel arriving at a port of the United States from Greece, which was provided with certain documents, should not be, save in certain exceptional cases, subjected to other quarantine than such as might be necessary for the visit of the health officer of the port.[16] Again, Article XIX of the Treaty of 1851 with Peru contained the following interesting provision:

"The said citizens (of the two contracting powers respectively) shall not be liable to imprisonment without formal commitment under a warrant signed by a legal authority, except in cases flagrantis delicti, and they shall in all cases be brought before a magistrate, or other legal authority, for examination, within twenty-four hours after arrest; and if not so exam-

[15] Argentina, 1853, Art. IX, Treaties and Conventions, 20; Bavaria, 1845, Art. III, *ib.*, 46; Colombia, 1846, Art. XII, *ib.*, 198; The Two Sicilies, 1855, Art. VII, *ib.*, 1112.

[16] Art. XV, "Treaties and Conventions," 506.

ined, the accused shall forthwith be discharged from custody." [17]

It will occur, of course, that, from the point of view of the United States, the intended beneficiaries of this provision were American citizens in Peru; but the provision is in terms reciprocal, and it is certainly of the very essence of good faith that one nation should not enter into engagements which it is powerless to enforce, no matter how remote the contingency that it will be called upon to do so, in order to induce another nation, capable of enforcing them, to incur similar obligations reciprocally. This would seem to be too plain for argument.

"This is the kind of engagement you see,
That is binding on you, but not binding on me."

The pleasing irresponsibility of Miss Flora McFlimsey is, when predicated of members of the Family of Nations, decidedly less diverting.

Finally, Articles II and IV of the Treaty of 1854 with Great Britain [18] also deserve special notice. The former of these articles runs as follows:

"It is agreed by the high contracting parties that British subjects shall have in common with the citizens of the United States, the liberty to take fish of every kind except shell fish on the eastern sea-coasts and

[17] *Ib.*, 857. [18] *Ib.*, 450-2.

shores of the United States north of the thirty-sixth parallel of the north latitude, and on the shores of the islands thereunto adjacent, and in the bays, harbors, and creeks of the said sea-coast and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the purpose of drying their nets and curing their fish. . . . It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all fisheries in rivers and mouths of rivers are hereby reserved exclusively for fishermen of the United States."

These provisions reappear, in substantially the same form, in the Treaty of 1871 with Great Britain.[19] The constitutional question that they give rise to is indicated by the following extract from the opinion of Attorney-General Griggs of September 20, 1898, sustaining them:

"The regulation of fisheries in the navigable waters *within the territorial limits of the several States, in the absence of Federal treaty, is a subject of state rather than federal regulation. The fact that a treaty provision annuls and supersedes the law of a particular State upon the same subject is no objection to the validity of the treaty.*" [20]

It is also worth noting that the contention of the United States with reference to reciprocal provisions

[19] Art. XIX, *ib.*, 486.
[20] 22 Ops. 214, citing Ware *v.* Hylton and ensuing decisions.

in these same treaties, according to American citizens similar privileges in British-American waters and on British-American shores, has always been, up to the time of the recent arbitration of the question, that such privileges were immune even from local police regulation, even though this did not discriminate against Americans.[21]

The relevant provision of Article IV of the Treaty of 1854 is of contrary implication. It runs thus: "The Government of the United States . . . engages to *urge upon the State governments* to secure to the subjects of Her Britannic Majesty the use of the several State canals on terms of equality with the inhabitants of the United States." The idea underlying this provision is easily glimpsed: it is that the canals in question, unlike the fisheries, owe their existence, not to nature but to the States themselves, and it is inferred from this circumstance that they are not subject to control by the National Government for its purposes. This, however, is simply the notion of State interposition in a somewhat more subtle guise, the notion namely of some faculty ininhering in the States to thrust themselves at points between the United States and the persons and things that would otherwise be subject to its jurisdiction in the exercise of its constitutional powers. *For if the United States is a truly territorial sovereign with respect to the powers assigned it by the Constitution,*

[21] *Vd.* Moore, I, 806-66.

the only thing that is necessary to render a person or object or institution subject to its jurisdiction in the exercise of those powers, is that such person, object or institution exist within the boundaries of the United States, and the manner of its coming into existence is a consideration totally beside the point. Nor is this to forget that the Fifth Amendment is controlling upon the National Government. If the use to which the National Government, in the exercise of its treaty-power, should subject State property should amount to a "taking," doubtless the National Government would have to render "due compensation" for it. And that a State would be given a fair opportunity to establish such a claim in a court of equity seems also beyond doubt.[22]

But the treaty of this period to which the exponents of the State-rights point of view most often turn for consolation and support is the Consular Convention of 1853 with France, which contains the following provision:

"In all the States of the Union, *whose existing laws permit it,* so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it

[22] *Vd.* Pennsylvania *v.* Wheeling and B. Bridge Co., 13 How. 518; Kansas *v.* Colorado, 206 U. S. 46. Of course a State could not sue the United States directly to recover the value of the property "taken." Kansas *v.* U. S., 204 U. S. 331.

as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed. *As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.*" [23]

This provision undoubtedly shows a tendency, which is further exhibited in a letter from Cass, Secretary of State under Buchanan, to Lord Napier, the British Minister, at Washington, in 1859, in which Cass characterizes the authority of the United States to conclude a convention superseding the laws of the respective States respecting the succession of aliens, as "questionable." [24] On the other hand, the very provision just quoted from the Convention of 1853 assumes, it will be noted, to limit the State power of taxation in favor of alien estates, and it would seem to be a peculiar logic that could establish a distinction between the power of taxation in such matters and that of regulation. Again the Argentine and Sicilian treaties, which are two of the four above referred to, as securing to aliens the right to succeed to both personal and real property in the United States on a basis of equality

[23] Art. VII, "Treaties and Conventions," 352.
[24] Moore, V, 177.

with citizens, fall to the years 1854 and 1855 respectively, while to the year 1857 falls the opinion of Attorney-General Cushing, referred to in a previous chapter, in which, upon the basis of the precedents laid down by Marshall and Story, the right of the National Government to abolish the disabilities of alienage throughout the United States is asserted in the most unequivocal fashion.

With the practice of the period before us, we turn back to consider the opinion of the Court, which, as we have seen, was the very citadel of the doctrine of the reserved sovereignty of the States. The problem which the Court had before it in connection with the treaty-power comprised a dilemma. On the one hand, because of the unqualified character of the delegation of this power to the National Government, the theoretical difficulties in the way of hedging round a field of interests which it must not venture to deal with were obviously insurmountable save, as we have seen, either by reducing the treaty-power to a mere mode of exercising other powers of the United States, or by indifference to those logical considerations that give the law its rational character. But, on the other hand, because of this same characteristic, the treaty-power presented a most evident menace to those interests which it was the purpose of the general doctrine of State rights to safeguard. Naturally, in the face of this situation, the Court showed some evasion and hesitation. Nevertheless we shall see

it approaching ever nearer and nearer to decisive utterance upon the issue that concerns us, but without achieving it ere its train of doctrine is interrupted by the Civil War. What we have to deal with, therefore, is not a group of utterances of legal weight, but rather a series of dicta, which might in the course of time have been made the foundation of real decision but which in fact were not, because of the intervention of the Civil War.

(1) The first of these dicta is from Chief-Justice Taney's opinion in *Holmes v. Jennison,*[25] which was decided in 1840, and runs as follows:

"It must be assumed that the framers of the Constitution intended that it (the power to make treaties) should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the *relation between the States and the United States.*"

This vague language plainly falls far short of reiteration of the Jeffersonian doctrine upon the general question. And this becomes yet more evident when we consider the exact point to which it bore reference, namely, whether the Governor of Vermont had, in the absence of a national treaty covering the subject, the right to surrender a naturalized citizen of the United States, charged with murder in Canada, to the Canadian authorities. The Court did

[25] 14 Pet. 540 (1840).

not decide the point, but in this same opinion, Chief-Justice Taney further expressed himself as adverse to the claim of power made by the Vermont executive, and this was plainly the view of the majority of the Court. However, it is apparent that *save for its possession of the treaty-power,* the power to extradite citizens of the United States, as I have already pointed out, would not fall to the United States at all, but would remain with the States.

(2) The second dictum, the obiter character of which is most obtrusive, is from Justice Daniel's opinion in the *License* cases. Not only is the opinion in question one of the five filed on that occasion, but no treaty was involved in the remotest way. Referring to Article VI, paragraph 2, of the Constitution,—only the opening clause of which he quotes, by the way,—Justice Daniel proceeds to pass the following comment upon its purport:

"This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument and its adaptation to the purposes for which it was created, necessarily imply. *Every power delegated to the Federal Government must be expounded in coincidence with a perfect right in the States to all that they have not delegated: in coincidence, too, with the possession of every power and right necessary for their existence and preservation:* for it is impossible to believe that these ever were, in intention or in fact, ceded to the General Government. Laws of the United States, in order to be binding, must be within

the legislative powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the *same powers;* for there can be no 'authority of the United States' save what is derived mediately or immediately . . . from the Constitution. *A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State.*" [26]

The ambiguities and evasions lurking in this language are most interesting. Justice Daniel would evidently like to confine the treaty-power to the general field marked out by the Constitution for the national legislative power, but in the end finds himself unable to do so. Finally, therefore, he contents himself with reiterating Randolph's doctrine in the Virginia Convention, that the treaty-power must act for the country at large and so cannot surrender the rights of particular States or particular individuals. The question remains,—what if it were for the interest of the country at large that such surrender should be made?

(3) Much more to the point is a whole group of dicta to be found in the opinions filed in the famous *Passenger* cases,[27] which were decided in 1849. The issue in these cases arose out of some New York and Massachusetts statutes, which imposed taxes upon alien passengers arriving in the ports of those States. By the narrow margin of five to four, the Court pronounced these statutes null and void as

[26] 5 How. 504, 613. [27] 7 How. 283 (1849).

tax measures, in conflict with the commerce clause of the Constitution, acts of Congress passed in pursuance thereof, and certain treaties of the United States. The treaties invoked in this connection really had very little, if anything to do with the issue, since the provisions relied upon of their own terms subjected aliens to the laws of the country. If, therefore, such laws were invalid, it is obvious that they must have been so for some other cause than conflict with a treaty provision in terms accepting them. Nevertheless this argumentative citation of treaties along with acts of Congress in opposition to the State laws in question enabled a number of the judges on both sides of the case to shape the general doctrine of reserved rights for the first time unmistakably as a limitation upon the treaty-power.

Most specific of such dicta is that from Chief-Justice Taney's dissenting opinion which runs as follows:

"The first inquiry is whether, under the Constitution of the United States, the Federal Government has the power to compel the several States to receive and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment this question lies at the foundation of the controversy in this case. . . . *For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person or class of persons, whom it might deem dangerous to*

its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this Court could neither recognize nor enforce. I had supposed this question not now open to dispute." [28]

In support of this doctrine Taney cites *Miln v. New York, Groves v. Slaughter,*[29] and *Prigg v. Pennsylvania,*[30] but the real source of it is obviously in those apprehensions which had shown themselves during the discussion of the Negro Seamen's acts.

And that Taney's anxiety upon this score was not solely a personal prepossession is shown by the following words from Justice Grier's affirming opinion on the same occasion:

"It must be borne in mind . . . that the controversy in this case is not with regard to the right claimed by the State of Massachusetts in the second section of this act to repel from its shores lunatics, idiots, criminals, or paupers, which any foreign country, or even of her sister States might endeavor to thrust upon her; *nor the right of any State, whose domestic security might be endangered by the admission of free negroes, to exclude them from her borders. This right of the States has its foundation in the sacred law of self-defense, which no power granted to Congress can restrain or annul.* It is admitted by all that those

[28] *Ib.*, 465-6.

[29] 15 Pet. 449 (1841).

[30] 16 Pet. 539 (1842).

powers which relate to merely municipal legislation, or what may be more properly called the internal police, are not surrendered or restrained."

True, Justice Grier mentions only the power of Congress, but as he subsequently instances the treaties supposed to be involved in these cases it seems evident that he meant to assert this "sacred law of self-defense" on the part of the States as against the entire range of national power. The question therefore arises in view of this general accord between them, what was the line that divided Chief-Justice Taney and Justice Grier on this present occasion? It was truly a rather hazy one. The former regarded the State acts involved as representing a *bona fide* exercise of the State's power of internal police, while the latter held them to represent an attempt on the part of the two States to evade the prohibition of the Constitution against a State's levying tonnage duties without the consent of Congress. And the line that separated the other justices of the majority from those of the minority was even more artificial. Thus Justice McLean condemned the statutes because they met the alien at the port of entry, while he was still outside the boundaries of the State. Once, however, he was within the State, mingled with the rest of the population, the State could deal with him as it saw fit. The idea seems to be that already mentioned of the United States sovereign externally and the

States sovereign internally, carried to the logical extreme of denying to the United States any territorial sovereignty at all save on the extreme outer rim of the nation, so to speak. Thus the idea that the States have certain powers which they may exercise until their acts come into conflict with an overriding national power, Justice McLean will have nothing of: "This argument," he says, "degrades the States by making their legislation, to the extent stated, subject to the will of Congress." In other words, the States occupy one field and the United States an entirely different field of authority. True, McLean does not instance the treaty-power in this connection and would perhaps have excepted it from the operation of the principle he states. But what the purport of that principle logically pursued would be, is plain: it would be to supersede the doctrine of national supremacy with the doctrine of mutually exclusive sovereignties.

The most nationalistic of the justices at this period was Justice Wayne, who, in his opinion in this case, brings forward the brilliant idea of a national police power in connection with its power over commerce. National power, he also urges, is territorial in the same sense as is that of the States. Nevertheless he, too, seems to concede the States at least a modicum of absolutely reserved power, one item of which is "the police right to turn off from their territories paupers, vagabonds, and fugitives from justice. But," he urges, "they have not reserved the *use of*

taxation universally as the *means* to accomplish that object." As to national power, "it is necessarily a part of the power of the United States," by virtue of the commerce power or the treaty-power,

> "to determine who shall come to and reside in the United States *for the purposes of trade,* independently of every other condition of admittance which the States may attempt to impose upon such persons. When it is done in either way, the United States, of course, subject the foreigner to the laws of the United States and *cannot exempt him from the internal power of police of the States in any particular in which it is not constitutionally in conflict with the laws of the United States.*"

True, the final clause of this passage renders its exact purport ambiguous; still its general intention seems plain, namely, to safeguard again a certain field of State power from invasion by the treaty-power.

(4) That the Court stood ready, therefore, should the question present itself squarely and unavoidably, to vindicate the police powers of the State, or at least a certain core of these, embraced by the "sacred law of self-defense," as against even the treaty-power, can scarcely be doubted after the *Passenger* cases. Moreover, even at the time of these cases, in one of the circuits, that of Justice McLean, the question had been met and disposed of in the way indicated, in connection with certain Indian treaties, which, of course, by the doctrine of *Worcester v.*

Georgia are to be regarded as on a parity in all respects with treaties with foreign nations. The first of this series of cases which I have in mind, occurred the year before Marshall's death. In it Justice McLean pronounced unconstitutional the first section of the Congressional Act of 1817, providing that

"if any Indian or other person . . . shall . . . within any . . . territory belonging to any nation . . . of Indians . . . commit any crime . . . such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offense, if committed within any place or district . . . under the sole and exclusive jurisdiction of the United States."

True, the basis of this decision was that no "provision by treaty between the Cherokee nation and the Federal Government has been made to embrace a case like the present," namely, one of homicide committed by one white man against another within the Indian country; but it is added: "*It is not pretended . . . that the treaty-power can be thus exercised.*" A year later the same point of view is again stated by the same judge in the following more explicit language:

"These relations (between the Federal Government and Indian Tribes) may be extended by treaties as far as sound policy, in the discretion of the treaty-making power, shall admit, where the Indians reside beyond the limits of a State; *but within those limits neither the treaty-making power nor the legislative*

power can be exercised so as to abridge the rights of a State." [31]

Strictly considered, both these utterances are probably obiter, but the same cannot be said of the decision upon the basis of the doctrine embodied in them, in *Lowry v. Weaver,*[32] a decade later, in which it was ruled that notwithstanding treaty stipulations, Indians living in a State and doing business as merchants were responsible by the laws of the State for the payment of their debts and that lands reserved to them under treaty might in certain circumstances be made liable for such debts.

This certainly is very explicit, and as certainly in flat contravention, if not of the very decision in *Worcester v. Georgia,* at least of its essential logic. The sole question, therefore, is whether the Supreme Court ever ratified the doctrine in question and gave it the weight of ultimate decision. The only case at all in point that came up before the Supreme Court during the period under review in this chapter was that of *People ex rel. Cutler v. Dibble,*[33] which was decided in 1858. The question at issue was whether defendant, who held title to certain lands within the Seneca Indian Reservation under treaties between those Indians and the United States dating from 1838 and 1842, was entitled to enter upon such lands

[31] U. S. *v.* Bailey, 1 McLean (U. S. Ct. Ct.) 231 (1834); U. S. *v.* Cisna, *ib.* 254 (1835).
[32] 4 McLean 82 (1846).
[33] 21 How. 366. See also Fellows *v.* Blacksmith, 19 How. 366 (1856).

or whether he was a trespasser under a certain New York statute prohibiting intrusions upon Indian reservations. The New York court of appeals ruled that he was to be held under the statute on the ground that the treaty had never been put into effect by the removal which it contemplated of the Seneca Indians. But the Court also took occasion to add that the State could not be deprived by the treaty of its power to take proper measures for the preservation of its internal peace.[84]

The State authority having been upheld, the case now came up to the United States Supreme Court on writ of error under the twenty-fifth section of the Act of 1789. The Court, speaking through Justice Grier, upheld the New York decision, in an opinion of which the following passages comprise the essential points:

"The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. . . . The power of a State to make such regulations to preserve the peace of the community is absolute and has never been surrendered. The act is therefore not contrary to the Constitution of the United States. Is it in conflict with rights acquired by Ogden and Fellows under the treaty, and the contract making part of it? If the Treaty of 1842 had been executed and the

[84] 16 N. Y. 203 (1857); *cf.* C. J. Denio in Fellows *v.* Denis-ton; 23 N. Y. 420 (1861); see also The New York Indians, 5 Wall. 761 (1866). The last two cases show a return to nationalistic premises.

United States, in its character of sovereign guardian of this nation, had delivered up the possession to these purchasers, then this statute of New York, when applied to them would clearly be in conflict with their rights acquired under the Treaty. . . . *Until* such removal and surrender of possession by the intervention of the Government of the United States, however, the Indians and their possessions are protected by the laws of New York from the intrusion of their white neighbors. We are of opinion therefore that this statute and the proceeding in this case is not in conflict with the treaty in question."

The exact significance of this language is equivocal and was perhaps intended to be. At first glance, it seems to signify that while the State's police power is absolute in the premises, it is so only until the conflicting treaty shall be put into effect; but at second thought, it is evident that once the treaty were brought into effect, within the meaning of the Court, the statute involved in the case would no longer apply. But, at any rate, the constitutional issue is plainly avoided by the interpretation given to the treaty involved. That such interpretation, however, met the real intention of the treaty, I think more than doubtful. The provisions of it drawn into question were almost certainly designed to go into effect at once. While, therefore, this case cannot be cited as confirming in law McLean's decision in *Lowry v. Weaver,* yet the doctrine embodied in that decision was plainly material in shaping the decision in this case as well.

(5) The last group of dicta to be noted occurs in connection with the issue which marks the original battleground between the claims of State power and treaty-power, an issue, moreover, that initially was deemed to involve the whole constitutional question: I refer to the question of the right of the treaty-power to alter State laws on the subject of the rights of aliens in connection with the inheritance and disposition of property. In *Prevost v. Greneaux* [85] plaintiff was disputing the right of the State of Louisiana, under the Treaty of 1853 with France, to impose a succession tax upon property inherited anterior to the Treaty. Said the Court:

"If the property vested in him at the time, it could vest only in the manner, upon the conditions authorized by the laws of the State. And certainly a treaty, subsequently (*i.e.* to the vesting of the property) made by the United States with France could not devest rights of property already vested in the State, even if the words of the treaty had imported such intention. But the words of the article . . . clearly apply to cases happening afterwards."

The general doctrine stated is thus plainly obiter. But even were it not, it would still be doubtful whether it represented an assertion of the doctrine of reserved rights or of that of vested rights, as applicable to property rights of the State in its purely corporate capacity. The general right, how-

[85] 19 How. 1 (1856).

ever, of the treaty-power to control the State's power of taxation in the manner of the Treaty of 1853, is apparently not questioned.

Prevost v. Greneaux, however, was followed three years later by *Frederickson v. Louisiana,*[86] in which the whole constitutional question was drawn into argument by counsel for defendant State. "The United States had no power by treaty to interfere with or control the right of the State of Louisiana to tax property within its limits or regulate the descent of property in the State," these powers not having been surrendered by the States: such was the argument. But once again the Court evaded the issue by ruling that the treaty did not apply. Nevertheless, its language in repelling the constitutional question sounds not a little ominous. It has been suggested, it recites,

> "that the Government of the United States is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners in reference to property within the States. *The question is one of great magnitude,* but it is not important in the decision of this cause and we consequently abstain from entering upon its consideration."

These words spoken for a unanimous Court, which, moreover, had listened to argument upon the subject, strongly infer that the earlier precedents were regarded as no longer conclusive of the issue. But

[86] 23 How. 443 (1860).

if they were not thus conclusive, why not? Plainly the only reason was supplied by the altered viewpoint of the Court, between which and the issue in question, the Court saw an indissoluble nexus. In a word, Justice Campbell's language, just quoted, affords fairly good evidence *that the Court still regarded the entire doctrine of the reserved powers of the States as involved in the question of the constitutionality of the sort of treaty provision it had before it;* and as between the established precedents on one hand and its own general doctrine on the other, still hesitated to make the decisive choice.[37]

But thus much for our own evaluation of these dicta. Let us now inquire how they were regarded contemporaneously. In this connection I shall first cite Calhoun's "Discourse on the Constitution and Government of the United States," which was by all means the most important publication upon the subject it deals with during this period, and was written, of course, from an aggressively State-rights point of view, but by one, on the other hand, who, as Secretary of State, had had the handling of the treaty-power at a very important juncture. Secondly, I shall refer to two California decisions occurring near the close of this period and representing very interestingly the fluidity of doctrine just before the Civil War, owing to the obscuration of

[37] Benjamin's citations are the "Federalist," Nos. 32 and 34.

the precedents established by Marshall and Story by the subsequent dicta that we have been discussing. Lastly, I shall recur once more to Attorney-General Cushing's opinion of February, 1857, in which, with all the above utterances of the Court before him, save only that in *Frederickson v. Louisiana,* he reaffirms the doctrine of the earlier precedents without qualification or hesitation, and in which, moreover, he adduces logical considerations that absolutely exclude the idea of the treaty-power, though a constitutionally limited power, as limited in any direction by State power.

The passage from Calhoun first points out the striking difference between the manner in which the treaty-power is conferred upon the General Government by the Constitution and that in which its legislative powers are conferred. The latter are enumerated, but the language with reference to the treaty-power is general. "The reason," he writes,

> "is to be found in the fact that the treaty-making power is vested exclusively in the Government of the United States; and therefore nothing more was necessary in delegating it than to specify, as is done, the portion or department of the Government in which it is vested. . . . Very different is the case in regard to legislative powers. They are divided between the Federal Government and State Governments: which made it absolutely necessary, in order to draw the line between the delegated and reserved powers, that the one or the other should be carefully enumerated and specified."

But though "vested exclusively in the General Government," the treaty-power is not an unlimited power.

"It is, in the first place, strictly limited to questions *inter alios*, that is, to questions between the United States and foreign powers which require negotiations to adjust them. All such clearly appertain to it. . . . It is, in the next place, limited by all the provisions of the Constitution which inhibit certain acts. . . . It is also limited by such provisions as direct acts to be done in a particular way. . . ." Then there remains a more general limitation: "it can enter into no stipulation calculated to change the character of the government, or to do that which can only be done by the constitution-making power; or which is inconsistent with the nature and structure of the government, or the objects for which it was formed. *Among which it seems to be settled that it cannot change or alter the boundary of a State or cede any portion of its territory without its consent.* Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the limits of the treaty-making power and may be adjusted by it." [88]

Not a word, it will be observed, about the reserved powers of the States in relation to the treaty-power, though the existence of these in relation to the legislative powers of the General Government is specifically instanced as the reason for the careful

[88] Discourse (1855), 202-4.

enumeration of the latter. The date of the publication of Calhoun's work was 1855. We may assume, therefore, with some confidence that he had before him at least the earlier of the dicta above reviewed, in which the doctrine of reserved powers is asserted against the treaty-power. Certainly he had before him, as did no one else, the whole theory of State sovereignty and State rights, in the clearest and most uncompromising outline. What comment, then, does his failure to recognize in the reserved rights of the States a limitation upon the treaty-power pass not only upon the authority of such dicta, but their intrinsic rationality![39]

But not less significant are the California decisions I referred to, particularly when taken in conjunction with each other. The first of these is that in *People v. Naglee,*[40] in which the California Supreme Court was asked to overturn a State enactment requiring foreigners to procure a license for the privilege of mining in the State, on the ground that it conflicted, in particular, with the fourteenth article of Jay's Treaty as renewed by Article I of the Treaty of 1815. But, the Court points out, the privileges secured by this treaty to the subjects respectively of the two contracting powers are secured "subject always, as respects this article, to the laws

[39] Save for the exception made in reference to treaties of cession, this is precisely the same doctrine that Calhoun put forth in debate in Congress in 1816, when he was a strong Nationalist; Elliot, IV, 480-3.

[40] 1 Cal. 232 (1850).

and statutes of the two countries respectively." It then proceeds:

"the act then, is not repugnant to that treaty. But even if the provisions of the statute did clash with the stipulations of that or of any other treaty, *the conclusion is not deducible that the treaty must therefore stand, that the State law give way. The question in such case would not be solely what is provided for by the treaty, but whether the State retained the power to enact the contested law or had given up that power to the General Government. If the State retains the power, then the President and Senate cannot take it away by a treaty.* . . . To hold any other doctrine than this, would if carried out into its ultimate consequences sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective States, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the States to a foreign nation."

The Court then proceeds to quote at length Justice Daniel's doctrine in the *License* cases, and Chief-Justice Taney's doctrine in the *Passenger* cases, which furnish it with its sole support by way of citation.

The date of *People v. Naglee* is 1850. Five years later, the position taken up so unequivocally in that case was pretty completely abandoned in *People v. Gerke*,[41] in which it was ruled that the Treaty of 1828 with Prussia entitled subjects of that nation to inherit in the United States, notwith-

[41] 5 Cal. 381 (1855).

standing adverse State legislation. True, the opinion of Justice Heydenfelt insists that the treaty-power cannot be an unlimited power, since otherwise "the reserved rights of the States would be subverted," but when the precise question before the Court comes to be taken up, the established doctrine is stated to be "*that treaties are the supreme law of the land, and that State legislation must yield to them.*" The opinion then continues:

"I see no danger which can result from yielding to the Federal Government the full extent of powers which it may claim from the plain language, intent, and meaning of the grant under consideration. Upon some subjects, the policy of a State government, as shown by her legislation is dependent upon the policy of foreign governments, and would be readily changed upon the principle of mutual concession. This can only be effected by the action of that branch of the State sovereignty known as the General Government, and when effected, the State policy must give way to that adopted by the governmental agent of her foreign relations."

Thus is the supremacy of the treaty-power over State power reconciled ostensibly with the completest State sovereignty. And what is more, this is done upon the basis of the doctrine just quoted from Calhoun's "Discourse."

But Attorney-General Cushing turns certain accepted premises of the State-rights doctrine even more effectively to the vindication of the treaty-power against State power, as these are organized

under the Constitution. Thus he writes: "This power,

which the Constitution bestows on the President with the advice and consent of the Senate to make treaties, is not only general in terms and without any express limitation, but it is accompanied with absolute prohibition of exercise of treaty-power by the States. That is, in the matter of foreign negotiation, the States have conferred the whole of their power, in other words, all the treaty-powers of sovereignty, on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere, and one great field of international relation, of negotiation, and of ordinary public and private interest, is closed up, as well against the United States as each and every one of the States. That is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency. Nay it involves political impossibility. *For, if one of the proper functions of sovereignty be thus utterly lost to us, then the people of the United States are but incompletely sovereign,—not sovereign—nor in co-equality of right with other admitted sovereignties of Europe and America.*" Let us "suppose the Union not to have been formed, or now to be unconditionally dissolved. In that supposition each of the States, New York, for instance, is a sovereign power, possessing all the rights of peace and war which the law of nations accords to independent states. . . . New York, the independent State, we see clearly, could treat with Great Britain, France, Spain, for the reciprocal abolition of the droit d'aubaine, as well as for the modification of any other fact of private international right. It had the power

to do this, *de facto* on the day of the political separation of the thirteen colonies from Great Britain; it exercised it through the intermediary agency of the Congress of the Revolution in the treaties with Prussia and the Netherlands; it finally parted with the power in consenting to the Federal Constitution; *and the power, which it indubitably possessed of original right, which it exercised repeatedly, and which it has now ceased to possess, not being extinguishable in its nature, must, and in fact and in law did pass from its hands into those of the Federal Government.*" [42]

It seems to me that this argument has logically great force. Put the matter this way: If the States still retained the treaty-power individually—I use the phraseology of the State-rights philosophy—they certainly could not be regarded as possessing reserved rights against it, that is, against themselves. How, then, can they logically be regarded as possessing reserved rights against the same power in the hands of the National Government to which they have *exclusively* transferred it? It is true that if they still retained the treaty-power, their legislatures would also, doubtless, enjoy the right to abrogate treaties. But to instance this fact is merely to bring out once more that the consideration determinative of the whole issue between the respective claims of the treaty-power and State power is the declaration of Article VI of the Constitution, that treaties, so far as anything in State laws or constitutions is concerned, are supreme.

[42] 8 Ops. 411.

Then, there is also the practical phase of the question. Just because the States possess the large and valuable powers that they do in internal government, it becomes simply impossible to regard those powers as setting any sort of limit to a power of the National Government which they do not supplement but could only impede. Is the United States a sovereign nation in respect of those relations which every sovereign nation maintains with others? This is the whole question. For if, on account of the outstanding rights of what, in the eyes of International Law, are merely municipal governments, it is prevented from fulfilling its engagements with other nations, then, indeed, is it seriously hampered in maintaining that rôle which even the advocates of State rights have repeatedly assigned it, namely, the rôle of "*external sovereign*"; and to the extent that it is thus hampered, does it lose one of its chief reasons of existence. The sum and substance of the matter is this: The United States cannot at one and the same moment utilize its powers of negotiation to secure valuable rights for American citizens abroad, and plead incapacity to effect specific performance of its reciprocal engagements at home. *It cannot have its cake and eat it too.*[43]

[43] In connection with pp. 129–34, *supra*, *vd.* Farrand, I, 22 and 202.

CHAPTER VII

ADJUDICATION SINCE THE CIVIL WAR

THE constitutional doctrine of the Supreme Court immediately following the Civil War seems at first consideration to reveal some rather contradictory tendencies, but upon further scrutiny, it will be found to illustrate a single purpose on the part of the Court: that, namely, of conserving the landmarks. Particularly illuminative of this point of view, as well as of the double solicitude it required from the Court on the one hand for the proper claims of the nation, just emerged triumphant from a struggle involving its very existence, and on the other hand for the constitutional position of the States, perhaps for the moment menaced with actual extinction, is the opinion of Chief-Justice Chase in *Texas v. White*,[1] of which the following passage is especially instructive:

"The union of the States never was a purely artificial and arbitrary relation. It began with the colonies and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed . . . by the necessities of war and received definite form . . . . from the

[1] 7 Wall. 700 (1868).

Articles of Confederation. By these the Union was solemnly declared to be 'perpetual.' And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. . . . 'Without the States in union, there could be no such political body as the United States.' Not only therefore can there be no loss of separate and independent autonomy to the States through their union and under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution in all of its provisions looks to an indestructible Union, composed of indestructible States."

Thus at one and the same moment is fullest recognition rendered of the primary result of the war for our constitutional jurisprudence, and, obversely, notable effort is made to force that result into harmony with the major tenets of constitutional jurisprudence as it stood upon the eve of the war. Eventually the Court was to find that it could not, in all cases at least, cleave both to the idea of national sovereignty and that of State autonomy, but of the single-mindedness of its endeavor to preserve

what it regarded as the historical equilibrium underlying the federal system, there can be no doubt.

Some more definite specifications may be adduced. Without doubt the Court's greatest source of anxiety from 1868 on was the first section of the Fourteenth Amendment, taken in connection with the fifth section, which authorizes appropriate legislation by Congress to carry the Amendment into effect. Nor was Congress slow to avail itself of this commission. In 1870 it passed the Enforcement Act, denouncing penalties not only against State officers, but also against private persons who should, under color of any law, statute, ordinance, regulation, or custom, deprive any one of his civil rights and civil equality. A year later it passed the "Ku-Klux act" of the same general import, and in 1875 the Civil Rights act, decreeing the "equal enjoyment of the accommodations . . . of inns, public conveyances, . . . theaters and other places of amusement . . . to citizens of every race and color regardless of any previous condition of servitude." The purport of this legislation is palpable; it rested upon an interpretation of the Fourteenth Amendment which put Congress in a position to control at its discretion all the ordinary relations of private persons within the United States.

Everything now hinged obviously upon the attitude of the Supreme Court,—or rather upon its fortitude,—since of its general attitude there could be no doubt. By a series of decisions the most im-

portant of which were those in the *Slaughter-House* cases [2] and the *Civil Rights* cases,[3] in which latter the Act of 1875 was overturned, the Supreme Court established the following principles: first, that the prohibitions of the Fourteenth Amendment are addressed to the States as such and not to private persons; second, that these prohibitions contemplate only positive State acts and not acts of omission; third, that the amendment recognizes a distinction between State citizenship and United States citizenship; fourth, that it protects from State abridgment only the privileges and immunities which the Constitution by its other provisions bestows upon "citizens of the United States" as such. The underlying *ratio decidendi* of these decisions is indicated by the following passage from Justice Miller's opinion in the *Slaughter-House* cases:

"Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all . . . civil rights . . . from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? . . . We are convinced that no such results," results which would radically change "the whole theory of the relations of the State and Federal

[2] 16 Wall. 36 (1873). [3] 109 U. S. 3 (1883).

governments to each other and . . . to the people," " were intended by the Congress which proposed these amendments, nor by the legislatures which ratified them."

Nor did the Supreme Court confine the application of the point of view that so obviously dominates the decision in the *Slaughter-House* and *Civil Rights* cases, to the newly added parts of the Constitution. Thus in approaching the obligation of contracts clause, it extended the doctrine of the *Charles River Bridge* case enormously, going to the length of ruling that the State might in the exercise of its police power take away the right to carry on a business which in *its* judgment endangered public health or morals, although such business was done by a corporation chartered for that very purpose. Indeed, it was intimated that such charters themselves, in so far as they purported to be indefeasible, were invalid *ab initio,* since " the legislature cannot bargain away the public health or the public morals." [4] And the point of view from which the commerce clause was construed was similar. In this connection again the Court was in a sense called upon to deal with a new group of problems, since, whereas plenty of cases had been earlier decided under this clause, the majority of them had arisen in connection with foreign commerce, while the cases that now began coming up generally concerned commerce among the

[4] Beer Co. *v.* Massachusetts, 97 U. S. 25 (1877); Stone *v.* Mississippi, 101 U. S. 814 (1879).

States. On the other hand, the rule that had been laid down by a unanimous Court in the great case of *Cooley v. the Board of Wardens of the Port*[5] in 1850, on the face of it, at least, was intended equally for foreign commerce and for inter-state commerce. That rule was as follows:

"Whatever subjects of this power (to regulate commerce) are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

But the significant point is that in the years following the Civil War the Court recognized no such subjects within the field of inter-state commerce. On the contrary, as late as 1876, it ruled that the rates at which goods destined for points beyond the borders of a State should be carried while within the State was a consideration touching the interests and welfare of the State more immediately than that of the country at large and was, therefore, in the absence of positive legislation by Congress matter for State determination.[6]

The rule is the very obverse of the law to-day, when State regulation even of infra-State rates is jealously supervised, lest it impose burdens upon commerce among the States.[7]

[5] 12 How. 299 (1851).
[6] Peik *v.* Chicago & N. W. Railway Co., 94 U. S. 164 (1876).
[7] *Cf.* the recent decision of Judge Sanborn in Minnesota Rate cases.

However, as I have above suggested, these decisions in support of the police powers of the States represent but one phase of the Court's doctrine at this period. Invited to review the pretensions of the General Government within the field that had been indubitably occupied by it anterior to the war or in consequence of its efforts at self-preservation, the Court came loyally to the support of national power, save in one unfortunate instance, in connection with which, however, it immediately rectified its fearful error. Of the manner in which the Court during the very years in which it was restricting the purport of the Fourteenth Amendment at those points where it appeared dangerous to State autonomy, asserted the National Government's powers of enforcement within the sphere of its delegated authority as those of a fully equipped territorial sovereignty, I shall have occasion to speak in the following chapter. But the single example just alluded to will not be out of place at this point: namely, the decisions in the *Legal Tender* cases of 1871, overruling the decision in *Hepburn v. Griswold*[8] of the year previous. The question at issue was the power of the National Government to issue legal tender paper as an item of its borrowing power, or as a means "necessary and proper" for carrying that power and its power to wage war, into effect. In *Hepburn v. Griswold* the Court—not then at its legal size—had by the narrow margin of four to

[8] 8 Wall. 603 (1870).

three ruled adversely to the Government, but in *Knox v. Lee,*[9] the lost ground was more than recovered. Justice Strong, speaking for the Court, based his argument largely upon the great precedents established by Marshall and Story in *McCulloch v. Maryland, Cohens v. Virginia,* and *Martin v. Hunter.* Justice Bradley, in his concurring opinion, appeared to lay down even broader doctrine: "The Constitution of the United States," he wrote,

> "established a government and not a league, compact, or partnership. . . . The United States is not only a government, but it is a National Government and the *only government in this country that has the character of nationality.* . . . Such being the character of the General Government it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which at the time of adopting the Constitution were generally considered to belong to every government as such, and as being essential to the exercise of its functions."

Accordingly, I say, the effort of the Court in the years immediately ensuing upon the Civil War was to preserve the landmarks, both with reference to State power and with reference to national power. But such being its guiding principle, could there be any doubt of the position it would assume, when the issue arose, as to the relation of the treaty-power with reference to State authority of whatsoever sort? If the Court considered the doctrine of Mar-

[9] 12 Wall. 457 (1871).

shall and Story as to the implied powers of the National Government still vital doctrine, could there be any doubt that it would also consider their doctrines with reference to the scope and supremacy of national treaties as still the doctrine controlling it? The question was soon to arise, and in a form, moreover, to bring local interest into the sharpest conflict with the national good faith as pledged in treaty, that has ever occurred.

By Article V of the Treaty of 1868 with China,[10]

"The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from one country to the other for purposes of curiosity, of trade, or as permanent residents."

By Article VI of the same treaty it is stipulated that

"citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may be enjoyed by the citizens or subjects of the most favored nation; and reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation."

The point at which this treaty marks an advance upon previous treaties, even that of 1849 with

[10] "Treaties and Conventions," 179-82.

Hawaii, is, as I have earlier observed, in its extension to subjects of the Chinese Empire rights of *permanent* residence, without any specification or implied limitation as to the purposes of such residence. Nevertheless the reception with which the treaty initially met was favorable. The circumstances that produced a reversal of feeling in this reference on the Pacific Coast was the completion—very largely through the aid of Chinese labor—of the first overland railroad, which brought with it from the Eastern States thousands of Caucasian (principally Irish) laborers. These now for the first time began to find themselves in competition with the Chinese, whom they were soon compelled to acknowledge as formidable rivals, "not so much because of bad as of good economic qualities. They could work any number of hours under intolerable conditions; would eat the cheapest food, dwell in the most undesirable abodes, and through it all preserve a cheerfulness which was most exasperating to their Caucasian neighbors." As to wages, while they secured as much as they could, "they would always accept, if necessary, less than the white man considered essential to maintain life itself." [11]

However, another phase of the matter now began to reveal itself. For, if the habits of the Chinese immigrant were economically good, they were socially bad,—often atrocious. "In addition to

[11] E. E. Sparks, "National Development" (*Am. Nation*, Vol. XXIII), 203 ff.

habitual gambling and opium smoking, the Chinese brought in numbers of Chinese women for immoral purposes"—a practice to which President Grant animadverted in his message to Congress of 1874. "For ways that are dark and for tricks that are vain, the Heathen Chinee is peculiar," wrote Bret Harte, voicing the unanimous sentiment of the Pacific Slope. Finally, in 1877 came a great railroad strike, which the companies used Chinese to break. The result was the rise, principally in San Francisco, of a "workingman's party," with the slogan "Chinese cheap labor must go." Night after night the adherents of this party met to hear their orators at the "sand-lots." The chief of these was Dennis Kearney, who ended every harangue with the Cato-like refrain: "The Chinese must go." [12]

But even earlier than this, the anti-Chinese movement had begun to find expression in legislation meant not to nullify the treaty directly, but to effect the same end by indirection. And it was in consequence of this legislation that we have for review a most enlightening group of decisions from the lower federal courts of the Pacific States and the Supreme Court itself, touching upon the question of the relation of the treaty-power to State power.

The first of these cases was that of *Ah Fong* [13] which arose in California in 1874 and was decided by Justice Field of the Supreme Court of the United States, then on the circuit. The question at issue

[12] *Loc. cit.* [13] 3 Sawyer 144.

was the validity of a statute requiring a bond of shipowners as a condition precedent to their being permitted to land those whom a State commissioner of immigration might choose to consider as coming within certain enumerated classes, e.g., "debauched women." In behalf of this statute it was urged: first, that it applied in terms to all aliens and, therefore, comprised no discrimination against Chinese; second, that it was a precautionary measure well within the police powers of the State; third, that the treaty by assuring Chinese the same rights of residence as the subjects and citizens of the most favored nation, subjected them to the *ordinary laws,* just as, for example, the Treaty of 1794 did British subjects with reference to rights of trade. The first and third of these arguments were unexceptionable; upon the second point, however, Justice Field ruled that the treaty was not a fair exercise of the police power, but an attempt to prevent the ingress to the United States of those to whom the United States had by treaty assured such ingress. On the other hand, Justice Field's opinion does not give the treaty-power unlimited range of authority in relation to the police power. By virtue of its police power, he writes, the State may adopt

> "*precautionary* measures against the increase of crime or pauperism or the spread of infectious diseases from persons coming from other countries. . . . The legality of precautionary measures of this kind has never been doubted. The right of the State in this

respect has its foundation, as observed by Mr. Justice Grier in the *Passenger* cases, in the sacred law of self-defense, which *no power granted to Congress can restrain or annul.*"

This language is undoubtedly obiter, and more than that, it may be regarded as marking the idiosyncrasy of a judge who a few years previous while chief justice of California had occupied the extremest State-rights position in reference to a similar question.[14] Yet even Justice Field pronounces Taney's dictum in the *Passenger* cases as "argumentative" and "not necessary or authoritative"; and proceeds to explain it by Taney's special concern to save for the slave States the right to exclude free negroes. But Justice Grier's doctrine, it will be recalled, also took this question into contemplation. Finally, as we shall see presently, whatever sanction the Supreme Court may once have given to the doctrine of a self-defensive right indefeasibly vested in the States and not subject to intrusion by what were otherwise a constitutional exercise of national authority, was decisively withdrawn by the Court not many months after the *Ah Fong* case, and in connection with the very statute under review in that case.

Five years after *in re Ah Fong* occurred the interesting and important case of *Baker v. Portland*,[15]

[14] Lin Sing *v.* Washburn, 20 Cal. 534 (1862).
[15] 5 Sawyer 566 (1879); *cf.* People *v.* Warren, 13 Misc. Rep. (N. Y.) 615 (1895), cited by Butler.

which was decided by Judge Deady of the Oregon district. In this case the issue was supplied by an Oregon statute prohibiting the employment of Chinese laborers on the improvement of streets and public works in the State. Reciting the pertinent articles of the treaty, Judge Deady ruled that in permitting Chinese to become permanent residents of the United States, the treaty necessarily implied the right on their part "to live and to labor for a living." This decision is about as conclusive, I should say, as one could well ask of the general issue of the relation of the treaty-power to State power. For if a State's power to determine whom it shall employ in the *construction of its public works* is limitable by *implied* stipulations of the national treaties, little ground would seem to remain for the doctrine of rights absolutely reserved by the States. Nor does the general bearing of the case appear to have escaped the notice of the court. "So far as this court," runs the opinion in conclusion, "and the case before it are concerned the treaty furnishes the law, and with that treaty no State or municipal corporation thereof can interfere. *Admit the wedge of State interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether.*"

A few minor cases involving the same general considerations are determined by the same principles

I content myself with citing,[16] in order to come to the case of *Tiburcio Parrott*,[17] which the Court decided with a most unusual elaborateness of argument, both of the judges sitting filing opinions. This assiduity is explained by the fact that the enactments under review in that case included a State constitutional provision, namely, Article XIX, section 2, of the California Constitution of 1879, which ordained that " no corporation now existing or hereafter formed under the laws of this State shall, after the adoption of this Constitution, employ directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as shall be necessary to enforce these provisions." The argument of the State's attorney in defense of this provision and the statute enacted in pursuance of it embraced an obvious fallacy. Because the Supreme Court of the United States had by its recent decisions given " reservation clauses," as they were called, that is, provisions of either the corporation laws of a State or in specific charters granted by it, reserving to the State general control over its franchises, a broad operation as against the obligation of contracts clause of the National Constitution, it was absurdly inferred that such decisions accorded the State a general dispensation from *all* constitu-

[16] *In re* Wong Yung Quy, 6 Sawyer 442 (1880), see dictum in reference to police power on page 451 of opinions; *in re* Oh Fong and others, 6 Sawyer 451 (1880); *in re* Quong Woo, 13 Fed. Rep. 229 (1882).

[17] 6 Sawyer 349 (1880).

tional limitations in the regulation of corporations,—that, in other words, the State had a "reserved power . . . over the creatures of its laws" which "the treaty was not intended and cannot be construed to impair." This application of the doctrine of reserved powers the court rejected flatly. "Even if," said Judge Hoffman, "the reserved power of the State over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid because in conflict with the treaty." Later in his opinion Judge Hoffman puts this query:

"would it be believed possible, if the fact did not so sternly confront us, that such legislation as this could be directed against a race whose right freely to emigrate to this country and reside here, with all 'the privileges and immunities and exemptions of the most favored nation,' has been recognized and guaranteed by a solemn treaty of the United States, which not only engages the honor of the National Government, but *is by the very terms of the Constitution the supreme law of the land?*"

And these words come with the greater force since personally Judge Hoffman was evidently persuaded that unrestricted Chinese immigration was a bad thing. The opinion resumes:

"That the unrestricted immigration of Chinese to this country is a great and growing evil, that it presses with much severity on the laboring classes, and that

if allowed to continue in numbers bearing any considerable proportion to those of the teeming population of the Chinese Empire, it will be a menace to our peace, and even our civilization, is an opinion entertained by most thoughtful people. *The demand therefore that the treaty shall be rescinded or modified is reasonable and legitimate. But while that treaty exists the Chinese have the same rights of immigration and residence as are possessed by any other foreigners. Those rights it is the duty of the courts to maintain, and of the government to enforce.*"

Judge Sawyer, in his collateral opinion, pursues a similar line of argument. Quoting Justice Chase in *Ware v. Hylton* at length, he writes: "The States have surrendered the treaty-making power to the General Government and vested it in the President and Senate; and when duly exercised by the President and Senate, the treaty resulting is the *supreme law* of the land, to which not only State laws but *State constitutions* are in express terms subordinated." Nor could there be any doubt that the provisions of the Treaty with China were within the treaty-power. If that power has authority "to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, *it must have the power to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain.*"

From the circuit court we turn to the Supreme Court to obtain an unimpeachable ratification of the doctrine we have just passed in review. The only

case coming up to the Supreme Court in connection with State legislation of an anti-Chinese tendency was that of *Chy Lung v. Freeman,*[18] in which the statute drawn into question was the one involved in the earlier case of *Ah Fong.* As we have already seen, this statute did not ostensibly discriminate against Chinese. In view of this fact, therefore, the Court considered the only question before it to be whether the enactment was a fair exercise of the State's police power or whether it represented an unwarrantable incursion into a field exclusively reserved to Congress by the Constitution; and it held it to be the latter. Said Justice Miller, voicing the opinion of the Court:

"the passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress and not to the States. . . . If it be otherwise, a single State can, at its pleasure, embroil the United States in disastrous quarrels with other nations. We are not called upon by this statute to decide for or against the right of a State, *in the absence of legislation by Congress,* to protect herself by necessary and proper laws against paupers and convicts from abroad. Nor to lay down the definite limit of such right, *if it exist.*"

Obviously, there is no idea here of a self-defensive right of the States, exercisable in face of constitutional legislation by Congress and immune from invasion by any national authority whatsoever. On the

[18] 92 U. S. 375 (1875).

contrary, there seems to be grave doubt in the Court's mind whether the States may even in the absence of congressional legislation pass precautionary police measures that are in any wise restrictive of ingress into the country.

The import of the question thus raised by Justice Miller for the general constitutional issue under discussion in this essay, is at once evident. But it becomes more so, when we turn to the case of *Henderson v. New York*,[19] which Justice Miller, again speaking for a unanimous Court, decided at the same sitting with *Chy Lung v. Freeman*. In this case a New York statute of much the same character as that overturned in the *Passenger* cases was under review; and the argument offered in support of it was precisely the same as the one considered by the Court in the earlier case. The attitude of the Court toward that argument, however, was markedly and significantly different. "Assuming," said Justice Miller,

> "that in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the States, and that among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, they (the advocates of the New York enactment) assert that the power here exercised falls within this class and belongs rightfully

[19] *Ib.*, 259.

to the States. This power, frequently referred to in the decisions of this Court, has been, in general terms, somewhat loosely called the police power. . . . *Nothing is gained in the argument by calling it the police power. . . . Whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States.*"

Whatever verbal discrepancy there may be between this language and that of Marshall in *Gibbons v. Ogden* is, I believe, immaterial to the argument. And, in fact, Justice Miller transcribes at this point one of the passages quoted from that decision in Chapter III. Thus the question presents itself once more which we raised in that chapter: is it possible to distinguish between the supremacy of a power delegated to Congress over the States' police power, whenever the two come into conflict in an endeavor to control the same subject-matter, and the similar supremacy of the national treaty-power? Certainly no allowable principle has ever been formulated effecting such a distinction and it is as plain as day that none can be. If the *enumerated* powers of Congress are to be defined indifferently as to the presence or absence of conflicting State authority, then equally so at least is the treaty-power, which is vested exclusively in the United States, to be defined *without regard to the existence of the States.*

And evidently this was Justice Miller's view of the matter, since his opinion resumes in the following words:

"*If our government should make the restriction of these burdens (imposed by State laws) on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution.*" And again: "It is apparent therefore that if there be a class of laws which may be valid when passed by the States *until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class.*"

The opinion concludes thus: "We are of opinion that this whole subject has been confided to Congress by the Constitution"; and it is strongly intimated that Congress should exercise its powers without delay. Six years later Congress responded with an act decreeing the exclusion from the country of paupers, criminals, convicts, and lunatics, to which categories it added in 1890, polygamists, diseased persons, and persons incapable of self-support.

The doctrine of *Henderson v. New York* is logically decisive of the issue under discussion in this essay. It will be worth our while, therefore, to assure ourselves that this was not a merely sporadic decision, but indicative of the general course of constitutional doctrine from that time on. But before we undertake this task, it will be simpler to

complete our survey of cases dealing immediately with the question of the scope of the treaty-power, and, first of all, to call attention to doctrine that had been developed collaterally by some of the circuit courts in connection with the group of cases just under review, doctrine which brings the Constitution directly to the support of the rights of aliens within the jurisdiction of the United States, even in the absence of treaty stipulations.

The matter I have in mind is the elaboration in connection with the *Ah Fong* and related cases of the tenet that the final clause of the opening section of the Fourteenth Amendment guarantees, to quote Justice Field, the real author of the notion, "to all persons *whether native or foreign, high or low,* whilst within the jurisdiction of the United States" essentially the same rights. The same idea had been offered in argument in the *Slaughter-House* cases, on which occasion, however, the Court had curtly rejected it, in the following language: "We doubt very much whether any action of a State not directed by way of discrimination against the *negroes as a class,* or on account of *their* race, will ever be held to come within the purview of this provision." But among the four dissenting judges to this decision had been Justice Field, who, later finding himself in his own circuit, took the opportunity to convert his ideas into law. This he first did in the *Ah Fong* case, from his decision in which the above quoted words are taken. Five years later, in *Ho Ah Kow*

v. Nunan,[20] the famous "Queue case," in which he pronounced void a San Francisco ordinance providing that every person imprisoned in the county jail upon a criminal judgment should immediately have his hair clipped to uniform length of one inch from the scalp, he applied the same doctrine still more decisively, the treaty with China furnishing his argument with merely subordinate support. Finally, in *Yick Wo v. Hopkins*,[21] decided in 1886, the Supreme Court itself adopted the same point of view, overturning in consequence a municipal ordinance, which though couched in general terms, did in fact discriminate against the Chinese. The general import of this interpretation of the Fourteenth Amendment is obvious, though its specific applicability in the case of resident aliens is still a matter of considerable uncertainty. The political disabilities of such persons are, of course, not affected by the doctrine. Neither, it would seem, are those disabilities which are grounded in the common law, for example, in connection with the holding of real estate. Nevertheless a large and valuable class of rights are now shared by aliens within the jurisdiction of the United States, on an equality with citizens, even in the absence of treaty provisions conferring such rights.

Meantime, in 1879, in *Hauenstein v. Lynham*,[22] the constitutional question had cropped up once

[20] 5 Sawyer 552 (1879). [21] 118 U. S. 356 (1886).
[22] 100 U. S. 483 (1879).

more within familiar bounds. In this case the Court upheld the right of a citizen of the Swiss Republic, under the Treaty of 1850 with that country, to recover the estate of a relative dying intestate in Virginia, to sell the same and to export the product of the sale. The opinion of Justice Swayne for the unanimous Court contains a vague expression to the effect that "there are doubtless limitations of this power as there are of all others arising under such instruments" as the Constitution of the United States, but this circumstance does not detract, I think, from its thoroughly satisfactory character as a reiteration of the early constitutional doctrine in this class of cases. It bases the decision upon *Ware v. Hylton, Chirac v. Chirac,* and analogous precedents, to the operation of which it accords the fullest scope. True, in quoting from Justice Chase's opinion in *Ware v. Hylton,* Justice Swayne says: "We have quoted from the opinion of Mr. Justice Chase in that case, not because we concur in everything said in the extract, but because it shows the views of a powerful legal mind at that early period," etc., but with reference to *Fairfax v. Hunter,* he adopts Cushing's opinion that "*it is the direct constitutional question in its fullest conditions.*" Again he states that it is admitted on all hands that "*if the treaty applies, its efficacy must necessarily be complete.*" Finally, again leaning upon Cushing, he urges this consideration: "If the National Government has not the power to do what is done by such treaties, it can-

not be done at all, for the States are expressly forbidden to enter into treaties."

In *Geofroy v. Riggs*,[23] decided a decade later, the claim of a citizen of France to take land by descent in the District of Columbia from a citizen of the United States, was upheld. In the course of the opinion Justice Field, who spoke for the Court, found occasion to attempt a definition of the treaty-power of the United States in the following terms:

"*That the treaty-power in the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear.* . . . The treaty-power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and that arising from the nature of the government itself and that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign country."

This, of course, is dictum, but save for the insistence upon the necessity of State consent to a treaty ced-

[23] 133 U. S. 258 (1890).

ing territory lying within a State, it formulates, from my point of view, unexceptionable doctrine. A little later in the *Ross* case[24] Justice Field restates his position, somewhat sententiously, thus: "The treaty-power vested in our Government extends over all proper subjects of negotiation with foreign governments." Again, shortly anterior to *Geofroy v. Riggs,* the same Justice had spoken as follows: "While under our Constitution and form of government the great mass of local matters is controlled by local authorities, *the United States in its relation to foreign countries and their subjects or citizens are one nation.*" [25] Twelve years later, in *Downes v. Bidwell,*[26] the same notion receives statement from Justice Brown in the following words: "*In its treaties and conventions with foreign nations this government is a unit.*"

Within the last decade, the Supreme Court of the United States has had to decide but few cases in which a State law was alleged to be in conflict with a treaty of the United States. The most noteworthy of these was the case of the *Compagnie Française v. the State Board of Health of Louisiana,*[27] in which plaintiff in error, relying upon the most favored nation clause of the Treaty with France of 1803, invoked article XV of the Treaty of 1837

[24] 140 U. S. 453 (1891).
[25] Chae Chan Ping *v.* U. S., 130 U. S. 581 (1889).
[26] 182 U. S. 244 (1901).
[27] 186 U. S. 380 (1902).

with Greece to relieve it from the operation of the Louisiana State quarantine. The Court by taking a rather strained view of the treaty provision drawn in question upheld the State statute, though there was a vigorous, well-argued dissent by Justice Brown. The decision rests exclusively, however, upon the construction placed by the Court upon the treaty, and there is not the least hint or implication that if this were deemed applicable to the case, it would not prevail. On the contrary, in the course of argument, the Court refers to the State quarantine as "operating upon and effecting foreign commerce *by virtue of the inaction of Congress,*" an expression which obviously precludes any doubt as to what the position of the Court would have been upon the constitutional question, had it thought that before it.[28] In the case of *Tucker v. Alexandroff,*[29] in which the question at issue was the validity of defendant's arrest as a deserter in accordance with the terms of the Treaty of 1832 with Russia, no State law was involved. But the entire readiness of the Court to give this sort of treaty provision a liberal and effective construction makes the case worthy of mention.

From the Supreme Court we turn for a moment to the State Courts, the decisions of which may be dealt with very briefly, for three reasons: first, because they have been carefully collected in the read-

[28] *Cf.* Olsen *v.* Smith, 195 U. S. 332 (1904).
[29] 183 U. S. 424 (1901).

ily accessible works of Devlin [30] and Butler; [31] secondly, because they all rest upon principles and precedents which we have already considered at length, and thirdly, because the great bulk of them deal with the familiar subject of the removal by treaty of the disabilities of alienage in connection with ownership,[32] a further consideration of which were palpably a work of supererogation. The only cases I desire to mention, therefore, are two or three in which provisions of consular conventions depriving State courts of jurisdiction over certain classes of proceedings, were drawn into question. Such a case, for example, was that of *Tellefsen v. Fee,*[33] in which the Massachusetts supreme court refused jurisdiction of a seaman's action for wages on the ground that the case came within the purview of the consular convention with Norway and Sweden. Said the court: "An examination of the treaty and authorities above cited makes it plain that the Court has no discretion in the matter, and that the local authorities have no right to interfere." Of similar import for the general question was the decision of the Louisiana supreme court in the *Succession of Rabasse,*[34] in which it was ruled, that "the power

[30] Robt. T. Devlin, "The Treaty Power under the Const. U. S." (San Francisco, 1908), Secs. 230-66.

[31] Chas. Henry Butler, "The Treaty-Making Power U. S." (New York, 1902), II, Secs. 349-59.

[32] See also the "American Digest," 1887 ff., under titles "Alien" and "Treaty."

[33] 168 Mass. 188.

[34] Succession of Rabasse, 47 La. Ann. 1452.

of a Court to appoint an attorney for absent heirs," as authorized by a provision of the code, " was displaced by a treaty providing that upon the death of a citizen of a foreign country in the United States, without testamentary executor appointed by him," the consul of his country should have the right to appear personally or by delegate in all proceedings on behalf of the absent or minor heirs. Speaking to the constitutional issue, the Court said: *" It is idle to call in question the competency of the treaty-making power. . . . The treaty by the organic law is the supreme law of the land, binding all courts, State and Federal."* And to the same effect were the decisions of New York surrogates in the *Matter of Lobrasciano* [35] and in the *Matter of Fattosini* [36] in which a treaty provision giving a foreign consul the right to intervene in the administration and judicial liquidation of the estate of a deceased subject of the country represented by such consul was held to overrule a State law giving the right to administer to a local officer. Said the Court in the former of these cases, *" The fact that a treaty cannot be reconciled with a State law affords no reason why a State court should not enforce such treaty."*

The importance of these decisions consists, of course, not in the fact that they enlarge the reach of the treaty-power, for they only add judicial sanction to provisions of a type that have appeared in

[35] Devlin, Sec. 202, citing 38 Misc. Rep. (N. Y.) 415.
[36] *Ib.*, citing 33 Misc. Rep. 18.

treaties from the very beginning of our national history, but it consists in the fact that, considering their source, their tone, and their occasion, they warrant the greatest assurance that the doctrine of reserved powers available to the States in certain contingencies as against the treaty-power has been finally and conclusively shelved. At least, with that doctrine considered unavailable by State judiciaries to protect their own jurisdiction from invasion by treaty, we are warranted in feeling that it has lost most of its potency. And, indeed, I have come upon but a single judicial utterance of a date subsequent to the very early eighties lending any countenance to that doctrine. The utterance I refer to occurs, moreover, not in a State decision but in a federal decision of the district court of South Carolina. While ruling in the case of *Cantini v. Tillman*[37] that the State Dispensary Act of 1892 did not conflict with the provisions of a treaty with Italy, as it obviously did not, Judge Simonton saw fit to add that in "the lawful exercise" of their police power "the States are absolutely sovereign," that "such exercise cannot be affected by any treaty stipulations." The utterance is, of course, purely obiter; but besides that it is, if weight be given to the word "lawful," either equivocal or it is phrased in such sweeping terms as to be egregiously false; since it is altogether evident that what, save for the fact of its conflicting with a treaty provision, were a perfectly "law-

[37] 54 Fed. Rep. 969 (1893).

ful exercise" by a State of its police power, has been set aside by the courts time and time again.

However, the greatest security for the doctrine of the supremacy of national treaties over all State laws, constitutions, prerogatives, and authorities whatsoever, is to be found, as I have hinted above, in its entire harmony with the general doctrine of the national Supreme Court nowadays, which tends more and more distinctly to return to the basis provided by Marshall's construction of the Constitution. I do not need to show how since the latter eighties the Supreme Court has, by its ever broadening interpretation of the final clause of the opening section of the Fourteenth Amendment, brought State legislation generally under its supervision in the interest of individual rights and so has withdrawn from the States' police power, even when not competing with national power, any aspect of sovereignty that that power was perhaps entitled to wear before the Fourteenth Amendment was added to the Constitution.[38] The only thing I intend to do, with a view to exhibiting the supremacy of treaties as of the warp and woof of the entire fabric of our constitutional jurisprudence to-day, is to demonstrate clearly that the same quality attaches to the exercise by Congress of one of its enumerated powers, its power, namely, to regulate commerce.

The general tendency of the Court under Taney was, as we have already seen, to regard Congress'

[38] J. Peckham in Lochner *v.* New York, 198 U. S. 45 (1905).

power over commerce as limited, if not by the totality of the police powers of the States, at least by an inner core thereof. By the decision of the same tribunal in *Cooley v. the Board of Wardens* it was settled further that there was correspondingly an important field of commercial regulation which the States could not enter, even in the absence of congressional legislation, such field having been assigned by the Constitution *exclusively* to Congress. The principle of national supremacy in connection with congressional legislation regulating commerce was confined, in the minds of the majority of the Bench certainly, to that small area of power over which the States were supposed to have "concurrent jurisdiction" until Congress should choose to occupy the field. This general theory of the relation of the national power in reference to commerce to the State's power of police is, however, to-day materially different. It is still recognized that Congress' power is in certain references exclusive, and indeed the dimensions of the field thus kept clear for national authority against the day when it shall choose to enter there, tend ever to expand. At the same time it is still acknowledged also that the States may often act in a way touching commerce, until Congress acts positively and so supersedes State action. But, and here is the change in theory, it is held that the right of the States so to act rests, *not upon their possession of a power over foreign and inter-state commerce concurrent with Congress'*

power, but upon simply their general power of police, any exercise of which, none the less, is acknowledged to be subordinate to and supplantable by a constitutional exercise by Congress of its power to regulate commerce. In short, the doctrine of *Gibbons v. Ogden* is completely restored to-day. It is true, that one will frequently come upon expressions by the Court that seem to indicate that it still adheres to the idea that a hard and fast line may be drawn between congressional and State power, but such expressions are almost invariably susceptible of one explanation, i.e., they occur in decisions in which the legislation under review *is of State origin,* and are all aimed, therefore, at an attempt to define the police power of the State in reference to that portion of congressional power over commerce which is deemed to be exclusive and not at all with a view to securing State power from congressional invasion. In short, the tables of constitutional construction have to-day been turned: it is the National Government whose power over commerce is in part exclusive, while national legislation which is otherwise valid is in no wise affected by the circumstance of its collision with State legislation in exercise of the police power.[39]

All this can be made plain by a single illustration. In a series of four decisions in the late eighties and

[39] See, for example, Railroad Co. *v.* Husen, 95 U. S. 465; Smith *v.* Alabama, 124 U. S. 508; Minnesota *v.* Barber, 136 U. S. 313; Hennington *v.* Georgia, 163 U. S. 299. *Cf.* J. Brewer in U. S. *v.* Keller, 213 U. S. 138.

early nineties the Supreme Court established the doctrine that while a State by virtue of its police power, and in the furtherance of the public health, welfare, and morality, may prohibit the manufacture and sale within its limits of intoxicating liquors,[40] it cannot extend such prohibition to the introduction of liquors within the State through the channels of inter-state commerce,[41] nor without the consent of Congress the sale of liquors so introduced in the original package,[42] but that Congress having given its consent to the prohibition of sales in the original package, the State may henceforth prohibit them.[43] Objection was alternately offered to this line of doctrine from both sides of the interests involved: on the part of the advocates of the legislation drawn into question, it was urged that the consent of Congress was not necessary; while, on the part of the liquor people, it was urged that the consent of Congress was unavailing. But the result of each objection was from our point of view the same; namely, to bring the principle of national supremacy into clear, authoritative definition once more.

Thus, taking up the argument of the liquor men first,—we find this to have run about as follows:

[40] Mugler *v.* Kansas, 123 U. S. 623 (1887).
[41] Bowman *v.* Chicago and N. W. Railway Co., 125 U. S. 465 (1888).
[42] Leisy *v.* Hardin, 135 U. S. 100 (1890).
[43] *In re* Rahrer, 140 U. S. 545 (1891). The doctrine sustained by the Liquor cases is confirmed by the line of argument taken in the Oleomargarine cases: see 155 U. S. 461 and 171 U. S. 1.

the States have no power in the premises because that power belongs to Congress; but Congress cannot delegate its power to the States nor surrender to the States power which the Constitution confers upon it; therefore, the act of Congress purporting to consent to legislation which, but for it, the States would have no power to enact, can impart to such legislation no constitutional sanction. The way in which the Court met this argument was to return directly to *Gibbons v. Ogden*. Said Chief-Justice Fuller, citing that decision: "If a law passed by a State *in the exercise of its acknowledged powers comes into conflict with*" *the will of Congress, "Congress and the States cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of laws passed in pursuance thereof."* So long as Congress was silent, its will, by presumption, was that the sale in the original package of liquors imported from one State into another should be uninterfered with by the police power of the State of destination. Now, however, that it has spoken to contrary effect, the result is that the police power becomes operative in the premises. But this does not signify at all that Congress has parted with any of its power over commerce nor that the State to whose laws Congress consents has received a delegation of power to regulate commerce among the States. The State laws in question *"were enacted in the exercise of the police power of the State,"* by virtue of its reserved

power, and all that Congress has done is to repeal a presumptive exercise of power to which, so long as it stood, the State power was necessarily subordinated.

Such in outline is the decision of the Court in *Rahrer's* case. It represents obviously a deliberate and decisive restoration of the doctrine of *Gibbons v. Ogden,* a tentative reiteration of which we found in *Henderson v. New York.* However, there was a strong minority of the Court which in the interest of State power dissented from the line of doctrine above summarized. We have, therefore, to raise the question whether the position of this minority derogates to any extent from the seeming authoritativeness of this restoration. The answer is, "No." It is true that in its dissent in the Bowman case, this minority, speaking through Justice Harlan, based its contention in part upon the assertion that "the States *have not surrendered but have reserved* the power to protect by police regulations, the health, morals, and safety of the people," and that "*Congress may not prescribe any rule to govern commerce among the States which prevents the proper and reasonable exercise of this reserved power.*" This ground, however, was speedily abandoned. In his dissenting opinion in *Leisy v. Hardin,* Justice Gray, speaking also for Justices Harlan and Brewer, admits without qualification the supremacy of an act of Congress regulating commerce among the States over any conflicting State act whatever, but

protests against the doctrine that Congress must be presumed to have acted *merely by its silence,* with the effect of displacing the police power of the State. The recognition that the opinion thus affords of the general principle of national supremacy is the more impressive, as it succeeds a most striking collocation of judicial definitions of the police powers of the States, ranging from Marshall's definition in *Gibbons v. Ogden,* through the definitions formulated by the various justices in the *License* and *Passenger* cases, to Justice Miller's sweeping definition in the *Slaughter-House* cases. And a score of similar definitions in minor cases are also brought forward. But what is the purport of this notable assemblage of doctrine? It is stated by Justice Gray in the following words:

"*The prosecution of the safety, health, the morals, the good order, and the general welfare is the chief end of government. Salus populi suprema lex. The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments.* The Constitution of the United States and the laws made in pursuance thereof being the supreme law of the land, *all statutes of a State must, of course, give way, so far as they are repugnant to the National Constitution and laws. But an intention is not lightly to be imputed to the framers of the Constitution, or to the Congress of the United States, to subordinate the protection of the safety, health, and morals of the people to the promotion of trade and commerce.*"

In a word, while broadly defining the police powers of the States, which he characterizes as "inherent," Justice Gray freely admits the supremacy of the constitutional power of Congress over all conflicting State acts, when Congress has actually exercised that power. What he protests against is the subordination of the "inherent," "reserved" powers of the States to a mere judicial presumption of action by Congress. This language, taken in connection with the doctrine against which it is leveled, shows conclusively that the doctrine of national supremacy is once more the controlling canon of constitutional construction when a power delegated by the Constitution to the United States trenches upon or collides with a power reserved to the States,—the converse of which proposition is that *there is no such thing as a power absolutely reserved to the States and therefore insusceptible of invasion by what is otherwise a perfectly constitutional exercise of power by the National Government.* And if this is true of enumerated powers of Congress, it cannot be, as we have already seen, less true of the treaty-power, which is delegated to the United States exclusively and without qualification, other than that such qualification as resides in the words "under the authority of the United States," and secondly, the implied qualification that it is delegated for the recognized ends of negotiation. But neither of these qualifications can save State power. The ends of negotiation are determined by the ex-

igencies of external relationships, in which the States have no participation. And to define the "authority of the United States" by those powers over which the same paragraph of the Constitution pronounces *the supremacy of the authority of the United States* were mere solecism.

I admit that within another field of constitutional law, the law, namely, bearing upon the subject of the national power of taxation, the notion of rights absolutely reserved to the States still survives in a measure. But this is due to the fact that within that field authoritative precedents were established while the general doctrine of State sovereignty was still dominant with the Court.[44] As we have already seen, however, *no such precedents have ever* been established in connection with the treaty-power, and to-day it is too late to set up such doctrine. Ever more and more, and particularly in connection with the Supreme Court's interpretation of the commerce clause, does it become evident that, to quote Justice Wilson in *Chisholm v. Georgia* once more, *"as to the purposes of the Union, the States are not sovereign."* [45]

[44] Collector *v.* Day, 11 Wall. 113 (1870).

[45] J. Brewer's line of reasoning in Keller *v.* U. S., 213 U. S. 138, is anomalous and the decision itself in that case has since been substantially rejected. The recent decisions in Southern Railway *v.* U. S., 222 U. S. 20, and Mondou *v.* N. Y., N. H. & Hartford Railway (Jan. 15, 1912), furnish the correct doctrine.

CHAPTER VIII

RECENT PRACTICE AND OPINION

FROM judicial decision we turn once more to the practice and policy of the treaty-making power itself. Our primary search ought to be, I should say, for any really new type of treaty stipulation that may throw light upon the general question of the relation of the treaty-power to State power. Such stipulations, however, are extremely rare. The great period in treaty-making in the United States was the period from 1815 to 1857. During that interval agreements were entered into with almost every other member of the Family of Nations by which the status and privileges of American citizens abroad were secured and the status and privileges of the subjects of the other contracting powers were settled in the United States.

One new type of agreement, however, that is of interest from our point of view, appears for the first time in Johnson's administration. I refer to the "Trade-Mark Convention," a sample of which is furnished by the "additional article" of July 17, 1868, with Belgium.[1] This article reads thus:

[1] "Treaties and Conventions," 723.

"The high contracting parties, desiring to secure complete and efficient protection to the manufacturing industry of their respective citizens, agree that any counterfeiting in one of the two countries of the trade-marks *affixed in the other* on merchandise to show its origin and quality shall be strictly prohibited, and shall give ground for an action of damages in favor of the injured party, to be prosecuted in the courts of the country in which the counterfeit shall be proven."

Three years later the United States entered into the following agreement with the German Empire upon the same topic:

"With regard to the marks or labels of goods, or their packages, and also with regard to patterns and marks of manufacture and trade, the citizens in Germany shall enjoy in the United States, and American citizens shall enjoy in Germany, the same protection as native citizens." [2]

Meantime, in 1870, Congress had enacted a statute designed to protect trade-marks throughout the United States,[3] which was followed in 1876 by a penal enactment of the same intent.[4] In 1879, however, the Supreme Court, in the *Trade-Mark* cases,[5] held these acts "void for want of constitutional authority," ruling

[2] Treaty of 1871, Art. XVII, *loc. cit.*, 368.
[3] 16 Stat. L 210-1.
[4] 19 Stat. L 141-2.
[5] 100 U. S. 82 (1879).

"that if an act of Congress can in any case be extended, as a regulation of commerce, to trade-marks, it must be limited to their use in commerce with foreign nations, and among the several States and with the Indian tribes."

In 1881 accordingly Congress passed a new act renewing the protections of the act of 1870 for the owners of trade-marks "*used in commerce with foreign nations,*" "provided such owners be domiciled in the United States or located in any foreign country . . . which by treaty, convention, or law, affords similar privileges to citizens of the United States." [6]

The question that obviously presents itself is whether the decision in the *Trade-Mark* cases was intended to confine the treaty-power in making trade-mark conventions and the power of Congress in enforcing those conventions to the field delimited in that decision for the independent action of Congress. Fortunately the Court does not leave us in doubt upon this point; for, in the midst of its opinion occurs this caveat:

"In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks and of the duty of Congress to pass any laws necessary to carry treaties into effect."

True, this utterance does not settle the issue stated by it, but, on the other hand, it is rather significant

[6] 21 Stat. L 502-4.

that the Court should have taken such pains to check, in favor of the treaty-power, the operation of the general principles of its decision. Since 1879 the United States has entered often into trade-mark agreements, among these being the Convention of 1883 for the International Protection of Industrial Property, to which the United States acceded in 1887.[7] And in the enforcement of these agreements a number of decisions have, at various times, been rendered by the federal courts, but in none of these cases has the general issue been presented.[8]

But from our search for novelty we return to well-worn ground. Early in Grant's first administration a proposal came from Baden to open negotiations "with a view of conferring upon citizens of each the power of holding, disposing of, and succeeding to real estate in the territories of the other," and Mr. Bancroft, then American Minister at Berlin, was furnished by our government with full power to conclude such a treaty. In sending the full power, however, the Secretary of State, Mr. Fish, referred to doubts which had been raised "by extreme constructionists touching the constitutional power of this government to conclude such a treaty, doubts which I do not share." Still, in view of these doubts, he had deemed it wisest to obtain, in advance of any negotiations, an expression of opinion from the Senate through the chairman of the Committee

[7] "Treaties and Conventions," 1168-75.
[8] Butler, II, Sec. 447.

on Foreign Relations. The opinion communicated from this source was favorable.[9] That the treaty was not finally negotiated was perhaps due to the alteration in international status that Baden underwent very soon after this date. At any rate the constitutional issue could hardly have been the obstacle, for the same year the United States entered into a treaty of amity and commerce with the Republic of Salvador,[10] the third article of which provides as follows:

"The two high contracting parties . . . mutually agree that the citizens of each may frequent all the coasts and countries of the other, and *reside therein and shall have the power to purchase and hold lands and all kinds of real estate, and to engage in all kinds of trade, manufactures, and mining, upon the same terms with the native citizens,* and shall enjoy all the privileges and concessions in these matters which are or may be made to the citizens of any country, and shall enjoy all the rights, privileges, and exemptions, in navigation, commerce, and manufactures, which native citizens do or shall enjoy, submitting themselves to the laws, decrees, or usages, there established to which native citizens are subject."

Without doubt it was expected that the beneficiaries of these provisions would in the vast number of cases be American citizens in Salvador, but the pro-

[9] Moore, V, 178; "Treaties and Conventions" (Davis' Notes), 1239.
[10] "Treaties and Conventions," 958.

visions themselves are *in terms* reciprocal, and that fact should settle the theoretical issue.

Nevertheless, the doctrine of reserved rights was still capable of rearing its head occasionally, even in that department of government to which is intrusted the conduct of foreign relations.

"Were the question," wrote Bayard, Secretary of State in Cleveland's first administration, "whether a treaty provision which gives aliens rights to real estate in the States to come up now for the first time, grave doubts might be entertained as to how far such a treaty would be constitutional. A treaty is, it is true, the supreme law of the land, but *it is nevertheless only a law subject to all the limitations of other laws imposed by the same authority.* While internationally binding the United States to the other contracting powers, it may be municipally inoperative because it deals with matters in the States as to which the Federal Government has no power to deal. That a treaty, however, can give to aliens such rights, has been repeatedly affirmed by the Supreme Court of the United States (see Chirac vs. Chirac . . . etc.); and consequently, however much *hesitation there might be as to advising a new treaty containing such provisions, it is not open to this department to deny that the treaties now in existence giving rights of this class to aliens may as to municipal relations be regarded as operative in the States.*" [11]

Could one ask for a better illustration than these words afford of the essentially illogical character, to-day at any rate, of the doctrine of reserved pow-

[11] Moore, V, 179.

ers? It is admitted that the precedents establish the right of the treaty-power to remove the disability of alienage with reference to the holding of real estate in the States. It is admitted further, by plain inference, that the question of the right of the treaty-power in this connection involves the question of its relation to the reserved rights of the States. Yet it is insisted that the right of the United States to enter into treaties dealing with this subject still remains doubtful. But the fact of the matter is that Secretary Bayard soon abandoned this untenable and illogical position. For the very next year he negotiated a treaty with Peru,[12] the eleventh article of which runs thus:

"The citizens of either of the high contracting parties shall have the full power and liberty to dispose of their personal and *real estate* and effects of every kind and description, within the jurisdiction of the other, by sale, donation, testament, or otherwise; and their heirs or representatives being citizens of the other party, shall succeed to the said personal and real estate and effects, whether by testament or ab intestato, and may take possession of the same themselves or by others acting for them, and dispose of the same at their pleasure, paying such dues only as the citizens of the country wherein said estate and effects may be, shall be subject to pay in like cases."

On the other hand, in the year 1899, "the Department of State declined a proposal of the British

[12] "Treaties and Conventions," 1194.

Government to negotiate a treaty to prevent discriminatory legislation by the States of the United States, subjecting foreign fire-insurance companies to higher taxes than domestic companies." [13] But the reason given for the declination did not hint a doubt of the constitutional competence of the treaty-power of the United States. It was based purely upon the matter of fact that "the negotiation of such a treaty would probably be futile on account of the indisposition of the people to permit any encroachment upon the exercise of powers of local legislation." And, of course, it is at once obvious that if the treaty-power is competent to secure estates of aliens from discriminatory State taxation, which is what it had just assumed to do with reference to British subjects,[14] it is also competent to restrain the State power of taxation at any and all points at which it is exercised to the disadvantage of aliens in the United States.[15]

Another and still more recent treaty which deserves more than passing mention is the Consular Convention of 1902 with Greece.[16] This—and the same is true of a like agreement with Spain of the same year—provides an excellent résumé of the exemptions of this class of foreign representatives from the ordinary law of the land when stationed in the United States, exemptions which, it must be

[13] Moore, V, 164-5.
[14] Malloy, I, 774-6.
[15] 22 Ops. 214 belongs to the year 1898.
[16] Malloy, I, 855-60, and II, 1701-10.

remembered, are due, not as in the case of ambassadors and ministers to the recognition by the Constitution of their diplomatic character, but *entirely* to treaty stipulations. To specify more in detail, even though by way of repetition of much that was said in Chapter IV, Greek consuls in the United States are entitled to "all the privileges, exemptions, and immunities that are enjoyed by officers of the same rank and quality of the most favored nation." They are "exempt from preliminary arrest, except in the cases of offenses which the local legislation qualifies as crimes and punishes as such." They are "exempt from all direct taxes, national, state, or municipal, unless such taxes become due on account of the possession of real estate, or for interest on capital invested in the country," or unless they engage in "any profession, business, or trade." When a court in the United States "shall desire to receive the judicial declaration or deposition" of a consular officer of the Kingdom of Greece, it shall, if he is a subject of Greece and not engaged in commercial business, "request him in writing to appear before it; and, in case of his inability to do so, it shall request him to give his testimony in writing, or shall visit his residence or office to obtain it orally." However, in criminal cases, the appearance in court of the consular officer may be demanded, and it is indicated that this provision is in deference to Amendment VI of the United States Constitution and similar provisions in the State constitutions.

Again, "the consular offices shall at all times be inviolable. The local authorities shall not, under any pretext, invade them. In no case shall they examine or seize the papers there deposited." Again consular officers of the Kingdom of Greece, stationed in the United States, may take "the depositions of the captains and crews of vessels of their own country, of passengers on board of them, and of any other citizen of their nation. They may also receive at their offices . . . all contracts between the citizens of their country" and citizens or inhabitants of the United States, "and even all contracts between the latter, provided they relate to property situated, or business transacted," in Greece. And such contracts, having been duly authenticated by such consular officers "and sealed with their official seal, shall be received as legal documents in courts of justice throughout the United States." Again, "in all that relates to the administration and settlement of estates, the consular officers" of Greece "shall have the same rights and privileges as those accorded in the United States . . . to the consular officers of the most favored nations." The same officers, furthermore, "shall have exclusive charge of the internal order of the merchant vessels of their nation and shall alone take cognizance of differences which may arise at sea or in port between the captains, officers, and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts. In case any dis-

cord shall happen on board of vessels" of Greek subjects, "in the territory or waters" of the United States, "neither the federal, State, or municipal authorities or courts of the United States . . . shall on any pretext interfere except when said disorders" threaten a breach of the peace in the port or on shore. "In any other case, said federal, State, or municipal authorities or courts in the United States . . . shall not interfere, but shall render forcible aid to the consular officers, when they may ask it." Finally, said consular officers "are authorized to require the assistance of the local authorities for the arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country; and for this purpose they shall apply to the competent tribunals . . . and shall in writing demand the said deserters" and "such deserters, when arrested, shall be placed" at their disposal.

The points at which these provisions limit and control the jurisdiction of the States appear at first glance. Originally stipulations of this type were regarded as operative *ex proprio vigore*. But the Act of March 2, 1829, chapter 41,[17] supplements those which declare the duties of the National and State courts in the matter of securing deserters, with statutory mandate addressed to all courts of competent jurisdiction within the United States. Of like import is the Act of February 24, 1855, chapter 123;[18] as is also section 5280 of the Revised Stat-

[17] 4 Stat. L 359.

[18] 10 Stat. L 614.

utes. That the State courts enforce treaty provisions securing for consuls in the United States the right to interfere in the settlement of estates of alien descendants and their exclusive right to adjust wage disputes arising between masters of vessels and seamen, of their respective countries, we have already seen. And this is in the absence of congressional legislation upon the subject.

But, of course, the treaty that has brought the question of the relation of the treaty-power to State power forward most sharply in recent years is that of 1894 with Japan,[19] or more specifically, certain provisions of Articles I and II of that treaty. These provisions run as follows:

"Article I. The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territory of the other contracting party, and shall enjoy full and perfect protection for their persons and property. They shall have free access to the courts of justice in pursuit and defense of their rights . . . and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects. In whatever relates to rights of residence and travel, to the possession of goods and effects of any kind, to the succession to personal estate . . . and the disposal of property of any sort . . . the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights,

[19] Malloy, I, 1029-30.

and shall be subject to no higher imports or charges in these respects than native citizens or subjects, or citizens or subjects of the most favored nation. . . .

Article II. It is, however, understood that the stipulations contained in this and the preceding article do not in any way affect the laws, ordinances, and regulations with regard to trade, the immigration of laborers, police, and public security which are in force or which may hereafter be enacted in either of the two countries."

For twelve years these provisions stood unquestioned. Early in October, 1906, however, the San Francisco board of education, acting in pursuance of its powers under Article X, section 1662, of the California 'Political Code, adopted the following resolution: "Resolved that . . . principals (of schools) are hereby directed to send all Chinese, Japanese, or Korean children to the Oriental public school, . . . on and after Monday, October 15, 1906." Almost immediately, Baron Oku, the Japanese Ambassador to the United States, presented a complaint to the Government at Washington to the effect that the action of the San Francisco authorities was violative of the Treaty of 1894. The questions raised by this complaint were numerous and complicated; and as eventually the controversy was terminated by informal negotiation between the President and the municipal government of San Francisco, none of them reached an authoritative settlement. Furthermore, in the public discussion that ensued, the general issue was attacked from so

many different angles and such a variety of bias was revealed by the different participants in it, that it becomes impossible to regard its results as in any wise decisive.[20] The utmost, therefore, that can be undertaken with safety in the following paragraphs is to isolate the constitutional issue, to evaluate the most noteworthy discussion thereupon, and finally to utilize it as a test of the doctrine urged in this essay, that the police powers, which beyond all controversy belong to the States, can in no wise limit the scope of the national treaty-power.

Proceeding, then, to the task above outlined, the first question raised by this controversy is whether, entirely aside from the treaty, Japanese residents of San Francisco were not entitled by the Fourteenth Amendment to access to the public-school system of that city and, further, whether the attempt on the part of the municipal board of education to segregate them, on the ground of their race, to a particular school amounted to a deprivation of this right. The latter branch of this question we can answer in the negative, only adding the proviso that the accommodations afforded to pupils in the so-called Oriental School were substantially the same as those furnished by the ordinary schools and that this school

[20] See *American Journal of International Law*, May, 1907; *American Law Register*, February, 1907; *American Law Review*, July-August, 1907; *Columbia Law Review*, February and March, 1907; *Green Bag*, January, 1907; *Michigan Law Review*, March, 1907; *Yale Law Journal*, December, 1906; *Yale Law Journal*, April, 1907; *American Political Science Review*, August, 1907.

was reasonably accessible. True, this precise doctrine rests only upon State decisions, but the general principle upon which those decisions repose has been accepted by the Supreme Court of the United States time and again.[21]

But this is upon the assumption that the Fourteenth Amendment is available at all to alien residents seeking access to the public schools maintained by the State. Is this assumption warrantable? The answer is perhaps doubtful. In one of the State decisions just referred to occurs this dictum: "It seems . . . that as the privilege of receiving an education at the expense of the State is created and conferred only by State laws, it may be granted or refused to any individual or class at the pleasure of the State." [22] But the logic of this doctrine is utterly vicious, since consistently applied it would put all privileges arising from the State laws or institutions at the arbitrary bestowal of the State. Furthermore, the decision itself in which this dictum occurs, the date of which is 1883, is found upon examination to rest upon the distinction set up in the *Slaughter-House* cases between the privileges and immunities of citizens of the United States and those of State citizenship, and essentially to ignore the final clauses

[21] The leading State decisions are: State *v.* McCann, 21 O. St. 198 (1871); Cory *v.* Carter, 48 Ind. 327 (1874); Ward *v.* Flood, 48 Cal. 36 (1874); People *v.* Gallagher, 93 N. Y. 438. The Federal cases referred to are: Plessy *v.* Ferguson, 163 U. S. 547 (1895), and the Berea College case, 211 U. S. 45.

[22] People *v.* Gallagher, just cited.

of the first section of the Fourteenth Amendment, the two clauses, in other words, which are to-day the really vital portion of the Amendment in the protection of individual rights against arbitrary State legislation. The doctrine of the dictum just quoted is, therefore, most questionable.

However, suppose we concede the Fourteenth Amendment to be inapplicable to the case, the question next arising is that of the proper interpretation of the treaty. By the terms of the treaty itself Japanese subjects resident in the United States are subject to "the laws, ordinances, and regulations with regard to trade, the immigration of laborers, police, and public security which" were at the time of the negotiation of the treaty in force or might thereafter be enacted. It is apparent, however, that except to the extent that this clause was designed to save to the National Government the right to restrict the immigration of Japanese laborers to the United States, it must be harmonized with the earlier clause which puts Japanese subjects in the United States, so far as "rights of *residence*" are concerned, on a parity with citizens of the United States or citizens and subjects of the most favored nation.

This contention admitted, the question then becomes, whether rights of residence include a right of access to the public schools. In behalf of the negative view of the question, it has been pointed out that Article VII of the Treaty of 1868 with China

provided specifically that Chinese subjects coming to the United States should "enjoy all the privileges of the public educational institutions under the control of the Government of the United States," from which it is inferred, on the one hand, that the United States Government did not claim the right to secure to Chinese coming to the United States the right of access to the public educational institutions of the States and, on the other hand, that the rights of residence secured to such Chinese by the preceding article of the same treaty were thus recognized not to carry schooling privileges with them. But this assuredly is a far-fetched argument. Schools under the direct and exclusive control of the Government of the United States, namely the academies of West Point and Annapolis, are not schools to which the mere fact of residence would confer access even upon citizens. Again, the Treaty of 1868 is no more silent with reference to the public schools of the States than is the Treaty of 1894. But finally it must also be recognized that since the Treaty of 1868 a good deal of water has passed over the wheel. To-day, as a *matter of fact,* alien residents of the United States are everywhere admitted to the public schools. And this notorious fact, it is submitted, is better illuminative of the intentions of the treaty with Japan than strained constructions of a treaty made a quarter of a century earlier and long since abrogated.

And so we are brought face to face with the first

phase of the constitutional question: namely, had the United States power to make a treaty extending to alien residents within States the privilege of attending the public schools of such States? On December 4, 1906, Senator Rayner of Maryland offered the following resolution setting forth the negative view upon this question:

"Resolved, that in the opinion of the Senate this Government has no right to enter into any treaty with any foreign government relating in any manner to any of the public school systems of any of the States of the Union; . . . and Resolved further, that it is the duty of the President of the United States to notify the Government of Japan and any foreign government with whom the question may arise, that the public educational institutions of the States are not within the jurisdiction of the United States, and that the United States has no power to regulate or supervise their administration." [23]

The fundamental proposition upon which these resolutions rest is to be found in the following extract from Senator Rayner's speech of December 12, in support of them:

"I cannot admit that they (the States) have given all their treaty-making power, because they have only given the treaty-making power in connection with the delegated power, although the State itself has no right to make a treaty under the Constitution. While I cannot admit that the States gave all their treaty-making power, I will undoubtedly admit that the

[23] *Congressional Record*, 59th Cong., 2d Sess., under date.

States gave every treaty-making power that was necessary for the purpose of carrying out the delegated powers of the Constitution, and there are no other powers necessary." [24]

In other words, the treaty-power is not a substantive power at all, but only a mode by which the United States may carry out its other delegated powers. And it is contended that though the States retain no right to make treaties, yet they did not surrender the treaty-power in its entirety; that in the transference of the power from the States to the United States, some of it disappeared,—which is exactly the logical consequence that Cushing found utterly to condemn the position from which it flows.

Some other features of Senator Rayner's argument are also worthy passing notice. From the position just stated, he is forced to the paradoxical proposition that under the Articles of Confederation, the United States enjoyed a greater treaty-making power than it does under the Constitution; and in this way he attempts, in the very face of the language of the judges in that case, to explain away *Ware v. Hylton.* He particularly cites the remark of Justice Cushing in his concurring opinion, that Virginia was a party to the treaty and could not abrogate her own act. But why could she not abrogate her own act if, after the adoption of the Con-

[24] *Loc. cit.* See also Senator Frazier of Tennessee's speech of February 18, 1907, reiterating Rayner's point of view. The session ended March 4.

stitution, that act still derived any force from her earlier consent?

"The truth is," to quote a recent authority, "that the Constitution puts treaties made and to be made upon exactly the same footing, and in later cases . . . the doctrine of *Ware vs. Hylton* is considered as controlling with reference to treaties made after the adoption of the Constitution." [25]

And these later cases Senator Rayner essentially ignores. True he mentions *Chirac v. Chirac* and *Fairfax v. Hunter* by name, but he gets no further with them. He also adverts to the Chinese cases, but sweeps them aside with the remark that "the Court never touched upon the reserved rights of the States." Very true, but why not? If "reserved rights of the States" were not involved in a case like that of *Baker v. Portland* or that of *Tiburcio Parrott,* then neither were any such rights involved in the San Francisco school controversy, whatever interpretation be passed upon the Treaty of 1894.

The plain fact of the matter is that Senator Rayner's argument is not a well-considered performance. Thus, certain judicial utterances upon the police power which appear to characterize that power as absolute and indefeasible, but which were made without any reference to the treaty-power or any other power of the United States, are constantly referred to as pertinent. Secretary Hay's refusal to

[25] Willoughby, I, 504.

negotiate an agreement with reference to the status of foreign fire insurance companies in the United States, which was quoted above, is treated as a direct utterance upon the constitutional question. Throughout, characterizations of the treaty-power as a constitutionally limited power are brought to the support of the thesis that it is limited by the reserved powers of the States. Finally, the issue is presented as lying between a view of the treaty-power as grounded upon the notion of inherent sovereignty, and a view of it as resting upon constitutional grant. There is no validity to this contention. No one from 1789 to the present moment, save Senator Rayner himself in this speech, has, so far as I have been able to discover, ever suggested that the treaty-power of the United States was derived from any source other than the Constitution. Probably, however, what this statement of the issue signifies is that the Constitution itself is to be regarded as coming from the States and not the American People, and is, therefore, to be construed in the light always of the State interest. This view of the matter would seem to be somewhat out of date.

The most noteworthy presentation of the nationalistic view was that made by Senator Root, then Secretary of State, in his address before the American Society of International Law, April 19, 1907.[26] His position is stated in the following extract:

[26] *American Journal of International Law* for May, 1907.

"*In international affairs there are no States; there is but one nation,* acting in direct relation to and *representation of, every citizen in every State.* Every treaty made under the authority of the United States is made by the National Government, as the direct and sole representative of every citizen of the United States residing in California equally with every citizen of the United States residing elsewhere. It is, of course, conceivable that under the pretense of exercising the treaty-making power, the President and Senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but *so far as the real exercise of the power goes, there can be no question of State rights, because the Constitution itself, in the most explicit terms, has precluded the existence of any such question.*" [26a]

This admirable statement needs to be supplemented only at one point. The State-rights argument in the San Francisco controversy derived an appearance of plausibility from the circumstance that under the Japanese interpretation of the Treaty of 1894, the State right involved was the right to control institutions which the State itself had, by the

[26a] Elsewhere in his article Senator Root seems to suggest that there is a difference between the treaty-power and the legislative powers of the National Government, with reference to State power, on account of the fact that the States have no treaty-power. This, of course, is error. There are no reserved powers of the States against *any* power of the United States. On the other hand, it is true, as Cushing showed, that on State-rights premises the fact of the *exclusiveness* of the national treaty-power becomes of itself an argument to show that that power cannot be limited by State power.

exercise of its governing powers, called into existence. But as I have brought out before, the question of origins has no relevancy to the issue. *If the United States is a sovereign nation in respect of its treaty-power, all that is necessary for a person or thing within its jurisdiction to be subject to the control of that power, is that such person or thing exist.* Thus, States create corporations, but they cannot exact that their creatures shall not employ a certain class of aliens, who are entitled to the same rights of residence as other aliens. Again, States build public works, but they cannot refuse to employ aliens entitled to the same rights of residence as other aliens, in the construction of those works. Yet again, States establish and maintain courts of justice, to do so is one of their primary functions, but the courts thus established and maintained are open by treaty to citizens and subjects of practically every civilized nation on earth, on terms of *exact equality* with citizens of the United States.

Or take some parallel cases. Railroads within the States are public highways of the States. They are built by corporations created by the State to perform a recognized function of government and are vested with the sovereign power of eminent domain. Yet a State cannot make its franchise a source of profit to itself by taxing the carriage of inter-state freight by the railroads within its limits,[27] nor can it exercise its police powers in such fashion as to

[27] State Freight Tax case, 15 Wall. 232 (1872).

impose a material burden upon inter-state transportation.[28] For the purposes of inter-state commerce, in other words, the railroads of a State constitute national highways and are subject to national control. Likewise they are subject to national control for postal and military purposes.[29] Or a second case: State banks owe their existence to charters granted by the States, but the National Government can tax the issue of such banks, even to the point of extirpating it.[30] A State can make a State monopoly of the liquor business, but its dispensary will, none the less, be subject to the national excise tax.[31] Business corporations without exception owe their corporate character to an exercise of "sovereign power" on the part of States, yet the National Government can tax them in this very quality, the tax to be measured by income. Nay, it can break them up for transgressing its laws.[32] True, in the *Dispensary* case, the Supreme Court drew a line between the strictly governmental agencies of a State, which by such precedents as *Collector v. Day* are not subject to national taxation, and those social and eco-

[28] See generally, on this subject, Frederick H. Cooke, "The Commerce Clause" (New York, 1910). See also Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1.

[29] For review of statutes and doctrine see Wabash, etc., Railway Co. *v.* Illinois, 118 U. S. 557 (1886), overturning Peik *v.* Chicago & N. W. Railway Co., 94 U. S. 164.

[30] Veazie Bank *v.* Fenno, 8 Wall. 533.

[31] South Carolina *v.* U. S., 199 U. S. 437.

[32] Northern Securities Co. *v.* U. S., 193 U. S. 197; Standard Oil Co. *v.* U. S., 221 U. S. 1; Am. Tobacco Co. *v.* U. S., *ib.*, 106; *vd.* also Union Bridge Co. *v.* U. S., 204 U. S. 364.

nomic agencies through which the State exercises functions that have accrued to it since the adoption of the Constitution, but this distinction but serves to bring into higher light the amenability of the public schools of the State to national control for national purposes.

On the other hand, a State cannot tax a franchise granted by the United States.[33] The explanation of the difference is to be found in Article VI, paragraph 2, of the Constitution, that paragraph of the Constitution which also settles the supremacy of national treaties that are otherwise constitutional, over all conflicting State laws and constitutions whatsoever. And so much for the first phase of the constitutional question that arose out of the San Francisco controversy.

But there is also a second phase. What the San Francisco authorities set out to do was not to *exclude* Japanese pupils from all public schools but to *segregate* them on account of their race to a *particular* school. And that they could have done this had the Japanese in question been citizens of the United States—other things being equal—there can be no doubt. However, the treaty assures to Japanese residents in the United States, not simply the same treatment as citizens, but also the same treatment as "citizens or subjects of the most favored nation," wherefore the Japanese contended that the San Francisco ordinance was an attempt to deny

[33] California *v.* Central Pacific R. R. Co., 127 U. S. 1.

them on the ground of their race rights which the Treaty of 1894 guaranteed them on the ground of their alienage. The argument must be admitted to have had considerable force, especially in view of the fact that the Mikado's subjects all belong, and, at the making of the Treaty of 1894, were *known* to belong, to the particular race marked out for special treatment by the legislation objected to. Conceding therefore the Japanese interpretation of it to have been correct, the question again presents itself whether the treaty was within the competence of the treaty-power. I perceive no reason why not. The discrimination in question was imposed by State law and was removed by the treaty. That is the sum and substance of the matter. It is the ordinary case of a State law colliding with a treaty. True, the State law was, except for this collision, constitutional and operative. But that is true of any State law that collides with a treaty; for if it is otherwise unconstitutional, it is no law, and there is no collision. It was an attorney-general of the United States who, from a review of the decisions from *Ware v. Hylton* to *Hauenstein v. Lynham,* stated the applicable rule thus: "It is sufficient to say, that it has been held by the Supreme Court of the United States that *it is no objection to the validity of a treaty that it establishes within State jurisdiction a different law and standard of rights from that established by the laws of the State.*" [34]

[34] 22 Ops. 214.

However, it has been urged that certain rather paradoxical results must ensue from this view: by it, for instance, it would be within the competence of the treaty-power to secure the admission of Japanese subjects to the ordinary schools, while citizens of the United States of the Mongolian race were segregated. This is entirely possible, but the consideration would be of legal weight only if the discrimination removed by the treaty were imposed in consequence of constitutional mandate. But, of course, such is not the case; it is merely *not prohibited* by the Constitution.

Since the school episode the United States has engaged in two other controversies involving similar issues. In the first of these it has fallen to our Government to urge upon Russia the right of American citizens of Jewish origin to the same treatment, under the Treaty of 1832, as citizens or subjects of the most favored nation, though Russian law imposes upon members of this race who are the Czar's own subjects the most onerous discriminations, and though, too, the treaty in question only calls for "*the same security and protection*" for American citizens in Russia as "*natives*" enjoy. Our case against Russia, therefore, rested upon nothing like so strong grounds as did the case of Japan against us in 1906. Finally, therefore, we were forced to abrogate the Treaty of 1832 as *obsolete*. One of the strongest advocates of abrogation was Senator Rayner.

At the present moment (May 20, 1913) the State of California, after one or two earlier menaces of like nature, seems on the point of enacting a statute limiting the rights of aliens ineligible to citizenship in acquiring and holding land within the State strictly to the rights secured them by treaties "existing between the United States and the nation or country" of which such aliens are citizens or subjects. This statute will operate, coupled with a fair reading of the Treaty of 1911 with Japan, which has superseded that of 1894, to prevent Japanese, while they remain ineligible to citizenship or until they receive the right by treaty, from purchasing lands within California for agricultural purposes. From the point of view urged in this essay the California statute in its final form would seem to be unexceptionable. But the seventh section of it which declares that "Nothing in this act shall be construed as a limitation upon the power of the State to enact laws with respect to the acquisition, holding, or disposal by aliens of real property within this State" is of course mere sounding nonsense. A word of comment ought also to be passed upon Governor Johnson's defense of the measure, that the discrimination made the basis of it came originally from the national law with respect to citizenship. By this argument the United States would be unable to assure *any* rights within the States to aliens to whom it did not choose to accord the supreme right of citizenship. On the other hand, as an an-

swer to a claim of privileges under the Fourteenth Amendment, the argument would seem to have considerable force.

But we need not follow in the lead of controversy further. Instead, it will be more profitable to consider some less ephemeral and more authoritative expressions of opinion on the question of the scope of the treaty-power with reference to the reserved powers of the States.

First, of course, our attention is drawn to the works of Butler and Devlin heretofore cited. Butler's, the older and more comprehensive work, conveys the impression of having been assembled at different and perhaps considerable intervals. The result is that, upon some points the author falls into inconsistency; and in the end he undoubtedly abandons the thesis with which he set out, that the treaty-power is not susceptible of constitutional limitation. Upon the question of the relation of the treaty-power to the police power of the States, however, Butler is, for the most part, clear and consistent throughout in adherence to the following general statement of doctrine, with which he closes his review of cases bearing upon this subject:

"The decisions of cases affecting State statutes and treaties show that in all instances the treaty-making power is supreme and that conflicting State statutes must yield, and that State statutes have been upheld only when it clearly appears that they are not in contravention of the treaty stipulations involved. In none

of the cases reviewed . . . has the treaty-making power of the United States in any way been attacked or affected; the power exists, the treaties have always been declared valid; as to that point no question has been raised; the question for the court has always been whether the statute conflicts with the treaty or whether it can be so construed as to be consistent therewith, for only in such case can it be sustained." [35]

Devlin, in his work, which is more in the nature of a legal commentary than of a general treatise on the subject, takes the same point of view with reference to the relation of the treaty-power to State power. Thus the constitutional questions at issue in the San Francisco controversy,—Mr. Devlin is a member of the San Francisco bar,—he admits "involve to the fullest degree the extent of the treaty-making power of the United States on the one hand and the police power or powers to regulate its own internal concerns by the State on the other." Nevertheless, he reduces these questions to "the proposition whether a treaty may not suspend the power of the State to legislate in any manner obnoxious to the treaty," a proposition upon which he expresses himself as follows: "The treaty, whenever it conflicts with a provision of the constitution or statute of a State or of its common law, will supersede it. Both cannot stand when in conflict, and the treaty must be held to be the supreme law." [36]

But there are also some general works on Con-

[35] II, Sec. 359, p. 61.

[36] Secs. 145, 161, 194.

stitutional Law that demand passing notice in this connection. One of these is Cooley's " Principles of Constitutional Law." In his brief paragraph upon " Treaties," Cooley writes thus:

" *The Constitution imposes no restriction upon this power,* but it is subject to the *implied* restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the government or *any of the States of its constitutional authority.*" [37]

From what source does Cooley derive this restriction? He cites Story, section 1508, which was quoted at the close of Chapter IV. But that section lends no countenance to the idea of State power comprising a limitation upon the treaty-power. The only possible explanation of Cooley's venturing to cite it is in the supposition that he has misinterpreted Story's generic " state," by which he means in that particular instance the United States, as " State " in the specific sense of a member of the Union. Considering Cooley's miraculous talent in making constitutional limitations spring up in his pathway, the performance is perhaps not difficult to explain, even though he was at one time an editor of Story's work.

Two recent works which are characterized by a pronounced State-rights bias and in which one would expect to find, if anywhere, an assertion of State power as against the national treaty-power, are

[37] 3d ed., 117.

Franklin's Pierce's "Federal Usurpation" and John Randolph Tucker's "Constitution of the United States." But these expectations are disappointed. True, the latter, who is a great stickler for the prerogatives of Congress as against the treaty-making power,[38] also suggests this general limitation:

"The true canon of construction is, that the treaty-making power in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditional authority vested in the judiciary."[39]

But if this somewhat cryptic utterance has any other reference than to the power of the judiciary in the determination of "due process of law" under the Fifth Amendment and in defense of *individual* rights, it is quite unallowable doctrine. The constitutional declaration that treaties are supreme law of the land as against anything in the constitution or laws of any State is specifically binding upon the State judges, and *à fortiori,* by their oaths, upon the national judges, and if either transgress this declaration, they are guilty of usurpation and nothing less, and the latter are subject to impeachment by Congress. It must never be forgotten, that the only basis upon which the Court exercises the power of

[38] See his Report on the Hawaiian Reciprocity Treaty of 1887: 49th Cong., 2d Sess., H. R. Rep. No. 4177. Summarized in Butler, I, Sec. 307.

[39] Vol. II, 725 (1899).

passing upon the constitutionality of laws and treaties is the proposition that, in so doing, it is *enforcing* the *Constitution,* and not its own *will.*

Pierce's position, on the other hand, is quite unmistakable. He contends that it was precisely in the field of negotiation that the Convention of 1787 designed that the United States *should* be sovereign, though only in that field. Dealing with the San Francisco controversy, he warmly upholds the national position.[40]

Two very important works still remain: Pomeroy's "Introduction to the Constitutional Law of the United States"[41] and Willoughby's recent "Constitutional Law of the United States."[42] Both these scholarly works assert the utter impossibility of State power setting limitation to the treaty-power, though each suggests other limitations to it. Professor Pomeroy is strongly impressed with the view that the full scope of the treaty-power and of the adjunct power of Congress to pass laws necessary and proper has never been really appreciated; and by way of illustration urges the following proposition:

"I am of opinion that the General Government, under its function of controlling international relations, has the power, by proper legislation, to prevent a State

[40] Ch. VII, "The Treaty Power and State Rights."
[41] John Norton Pomeroy (10th ed. by E. H. Bennett), Boston, 1888.
[42] Westel W. Willoughby, 2 vols., New York, 1910.

from repudiating its public debt, so far as that debt may be held by foreign citizens. I repeat that in this executive attribute and in the capacity of Congress to pass laws in aid thereof, there is a source of power which has, as yet, been little resorted to, which has even been little thought of, but which is fruitful in most important and salutary results." [43]

Professor Willoughby's point of view is best illustrated by his comments upon the dicta in the *License* and *Passenger* cases, which were discussed in Chapter VI:

"The author is convinced that the obiter doctrine that the reserved rights of the States may never be infringed upon by the treaty-making power will sooner or later be frankly repudiated by the Supreme Court. In its place will be definitely stated the doctrine that . . . when a necessity from the international standpoint arises the Treaty-Power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded." [44]

[43] P. 571; see generally Secs. 673-81.
[44] P. 503.

CHAPTER IX

THE NECESSARY AND PROPER POWERS OF THE UNITED STATES

We come now to the question of what methods the National Government may resort to in enforcing its treaties within the States. In this chapter we shall consider the general doctrine applicable to the question and in the following chapter the history of treaty enforcement in the United States.

The National Government is a government over individuals. Its range of powers is limited. But within its assigned sphere it is a sovereign government.

"Every view we may take of the subject," wrote Hamilton in the Federalist, Number 23, ". . . . will convince us that it is both unwise and dangerous to deny the Federal Government an *unconfined authority as to all those objects which are intrusted to its management.* . . . A government, the Constitution of which renders it unfit to be trusted with all the powers which a free people *ought to delegate to any government,* would be an unsafe and improper depository of *NATIONAL INTERESTS.* Wherever *these* can with propriety be confided, the coincident powers may safely accompany them. This is the true result of all just reasoning upon the subject. . . . If it be true, as

has been insinuated by some of the writers on the other side . . . that the extent of the country will not permit us to form a government in which such ample powers can safely be reposed, it would prove that we ought to . . . resort to the expedient of separate confederacies which will move within more practicable spheres. For the absurdity must continually stare us in the face of confiding to a government the direction of the most essential national interests, without daring to trust to it the authorities which are indispensable to their proper and efficient management. *Let us not attempt to reconcile contradictions, but firmly embrace a rational alternative.*" [1]

That the Framers of the Constitution intended the National Government to be a sovereign government within the sphere of its delegated powers, that is a government possessed of a sovereign choice of means by which to carry its delegated powers into effect, is shown best perhaps by the proceedings in the Convention upon the subjects of treason and insurrection.[1a]

Article VII of the Report of the Committee on Detail to the Convention contained the following clause: "Treason against the United States shall consist only in levying war against the United States or any of them. . . . The legislature of the United States shall have power to declare the punishment of treason." Gouverneur Morris, Madison records, was displeased with these provisions. He

[1] The emphasis is from the original.
[1a] Farrand, II, 345-50; 467.

" was for giving the Union an exclusive right to declare what should be treason. In case of a contest between the United States and a particular State," he pointed out, " the people of the latter must, under the disjunctive terms of the clause, be traitors to one or other authority." To this practical argument Dr. Johnson of Connecticut added a theoretical one: " Treason could not be both against the United States and the individual States, being an offense against the sovereignty, which can be but one in the same community." Upon motion by Wilson and Johnson, accordingly, the phrase " any of them " was stricken out of Article VII, without a dissenting vote. However, as Madison pointed out, the article still left it with the States to define treason against themselves. But, said Ellsworth, " there can be no danger to the general authority from this; *as the laws of the United States are to be paramount.*" It must have been on this same occasion that Luther Martin introduced the motion which he tells us of in his " Genuine Information," providing " that no act or acts done by one or more of the States against the United States, or by any citizen of any one of the United States under the authority of one or more of the said States, shall be deemed treason or punished as such, *but in case of war being levied by one or more of the States against the United States,* the conduct of each party towards the other and their adherents respectively, shall be regulated by the laws of war and of na-

tions." Needless to say, this proposition did not meet the views of the Convention.[2]

And equally instructive of the intentions of the Convention was the failure on August 30, of an attempt of the State-rights contingent to substitute the word "insurrection" of the militia clause, for the quite distinct phrase "domestic violence" of what is to-day Article IV, section 4, of the Constitution. The purpose of the attempt is, of course, palpable: it was to confine by implication the right of the National Government in the use of the militia to those cases where application came from the State authorities themselves for military aid. *But the salient fact is that this attempt failed.* Nevertheless, seventy years later, in his remarkable Opinion of November 20, 1860,[3] dealing with the power of the United States to enforce its laws within a State that should pretend to have seceded from the Union, Attorney-General Jeremiah Black rendered an interpretation of the militia clause exactly annulling the action of the Convention. This clause, he contended, and related provisions of the Constitution "are made to protect the States," wherefore "to send a military force into any State with orders to act against the *people* would be simply making war upon them" and would effect the expulsion of such State from the Union.

And it is essentially the same point of view, of course, that dominates Buchanan's Message of De-

[2] *Ib.*, III, 223. [3] 9 Ops. 517.

cember 3, 1860,[4] where, moreover, the source of the noxious fallacy is revealed: namely, the Virginia Resolutions of 1798. Fortunately for the nation, both Buchanan and Black, in their endeavor to cling to this fetich of the State-rights school, had ignored some much more authoritative constructions of the Constitution: to wit, the fact that in 1794, at the time of the Whisky Rebellion, Congress had, by almost unanimous vote, authorized the President to send militia into the State of Pennsylvania without waiting for action by that State; the fact that in 1832, in his famous Proclamation to the People of South Carolina, President Jackson had asserted the right of the United States as a government, to take all needful measures in defense and in enforcement of its powers upon all persons within its jurisdiction; and—*mirabile dictu*—the fact that in 1809, the very author of the Virginia Resolutions, then President of the United States, had warned the Governor of Pennsylvania of the "painful issue" that must arise, should that State persist in its attempts to prevent the enforcement of the recent decisions of the Supreme Court in *United States v. Peters!*[5]

But, indeed, upon this point, as upon most other essential points, when it is not read "under the prepossession of some abstract theory of the rela-

[4] Richardson, X, 626.

[5] 5 Cr. 136; Marshall's decision disposes of the Doctrine of Nullification absolutely. For Madison's communications see "Amer. St. Papers," Misc. II, 12. For Pennsylvania's attitude see Ames, "State Papers," Nos. 23-5.

tions between the State and National Governments," [6] the Constitution is perfectly explicit. The provision I refer to, of course, is Article I, section 8, paragraph 18, which runs thus:

[Congress shall have power] "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The first case in which this clause of the Constitution was drawn into adjudication in connection with the doctrine of State rights was that of *United States v. Fisher,*[7] in which the statute involved was section 5 of the Act of March 3, 1797, which provided that in all cases of insolvency or bankruptcy of a debtor of the United States, the United States should be entitled to priority of payment out of his effects. One of the objections offered to this act and the answer returned by the Court are given in the following passage from Chief-Justice Marshall's decision:

"This claim of priority on the part of the United States will, it has been said, interfere with the right of the State sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt, to secure themselves against delinquencies on the part of their own revenue officers. But this is

[6] J. Bradley in *ex parte* Siebold, 100 U. S. 371, 383.
[7] 2 Cranch 358.

an objection to the Constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative powers of Congress extend."

But the enactment of Congress which incited the most continuous and desperate attacks from the partisans of State sovereignty was the twenty-fifth section of the Judiciary Act of 1789, the provisions of which were summarized in Chapter III. From challenging its constitutionality in the years 1814-19, they next turned to secure its repeal, and when they failed there, endeavored, with the like result, to undermine it by amending the Constitution.[8] The exact position of those who denied Congress the power to confer upon the Supreme Court the faculty of granting writs of error to State courts in accordance with the specifications of this act need not be stated in great elaboration. For the most part it rested upon the idea of the Constitution of the United States as merely part and parcel within each State of that State's constitution, and the correlative idea of the States as equal sovereigns in all respects with the United States, within the sphere of their reserved powers. From these principles it was inferred logically enough, that the federal authority could not presume to control the State judiciaries in any way. Accordingly, if a case arose

[8] Ames, "Amendments to the Constitution," 161 ff.; Register of Debates, 21st Cong., 2d Sess., App. I, xxxiii.

in the first instance in State courts, there it must be finally determined. True, in deciding such cases, if the Constitution of the United States, or an act of Congress, or a treaty of the United States, came to be drawn into question, the State judges would be bound by their own oaths to observe the mandate of Article VI, paragraph 2, of the United States Constitution,—and so to give supremacy to the Constitution, the acts of Congress, and the treaties of the United States, made with due authority, over conflicting State laws and constitutions. But their obligation in this connection would be that of *State* judges and to their particular *State,* and not at all to the United States. And this because the United States, though sovereign within the sphere of its powers, had no power to curtail the equal sovereignty of the States.[9]

The answer returned to this line of argument by the Supreme Court in *Martin v. Hunter's Lessee* and in *Cohens v. Virginia,* is compactly stated in the following paragraph from Chief-Justice Marshall's opinion in the latter case:

"That the United States form, for many and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing

[9] See the opinions of J. J. Cabell, Roane, and Tyler in Hunter *v.* Martin, 4 Mun. (Va.) 1.

their interests, in all these respects, is the Government of the Union. It is their government, and in that character they have no other. *America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent.* The people have declared, that in the exercise of all powers given for these objects, it is supreme. *It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory.* The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. *These States are constituent parts of the United States.* They are members of one great empire,—for some purposes sovereign, for some purposes subordinate." [10]

However, the argumentative resources of the State-rights philosophy were not yet exhausted. In this same case of *Cohens v. Virginia,* counsel for Virginia also set up the contention that the jurisdiction of the Supreme Court was barred by the Eleventh Amendment, an argument which Marshall disposed of by pointing out that the action had been begun by the State itself. But in *Osborne v. the Bank* [11] in which plaintiff in error was the Treasurer of the State of Ohio, the reverse was the case. The Court none the less took jurisdiction upon the basis of the rule, that a suit against a State officer claiming to act as such under an unconstitutional law was not a suit against a State but against the

[10] 6 Wheat. 264. [11] 9 Wheat. 738.

officer himself, who was responsible individually; from which it followed that the Supreme Court, in determining the question of its jurisdiction, was competent to pass upon the constitutionality of any law the authority of which was pleaded by such officer.

The competence of the United States, therefore, to judge finally of its own powers and the meaning of its own laws and treaties through its own courts,—a power which the Convention obviously intended it should have,—was definitely established. True, the operation of *Osborne v. the Bank* was somewhat curtailed in the years when State rights were dominant on the Bench, and the full force of that decision has been only recently restored;[12] but for the most part, the Court under Taney, even in the very act of accepting the premises of counsel for the State in *Cohens v. Virginia,* accepted also the conclusions of the Court in that case.[13] Such is the marvelous cat-like suppleness and longevity of the State-rights dialectic. Thrown out of the window, it still manages to land on its feet; and it has survived many times nine deaths.

We pass, then, to the second branch of our inquiry; which is into the power of Congress to provide penal sanctions for the enforcement of its powers and those of the other departments of government.

[12] *Ex parte* Young, 209 U. S. 123.

[13] See, for example, Prigg *v.* Pennsylvania, 16 Pet. 539, and Ableman *v.* Booth, 21 How. 506.

The police power is "the power to govern men and things" and to it belongs ordinarily the power of criminal legislation. Nevertheless, Congress is given the power to pass criminal legislation in certain cases by the express terms of the Constitution: namely, to "provide for the punishment of counterfeiting the securities and current coin of the United States"; "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations"; to "declare the punishment of treason."[14] These express grants, however, might by application of the principle *unius expressio exclusio alterius* be argued perhaps to have effected a denial to Congress of any further competence in the field of penal legislation, but in fact they have not been held to do so. That Congress possessed and would exercise the power to enact legislation of a penal character whenever such legislation would be necessary and proper to carry into execution the granted power of the National Government was generally assumed by those who inveighed against the absence of a bill of rights from the Constitution as it came from the Convention; and the same assumption obviously underlies the elaborate specifications of Amendments V, VI, and VIII. Moreover, at no time in the history of the Constitution has even the most rigorous school of constitutional construction denied Congress such competence, save in a few widely scattered instances.

[14] Art. I, Sec. 8, Pars. 6 and 10; Art. III, Sec. 3, Par. 2.

The history of congressional penal legislation begins with the Statute of April 30, 1790,[15] which was passed by the first Congress. By this enactment were stipulated the penalties for treason and misprision of treason, for piracy and felony on the high seas, for any attempt on the part of a federal or *State officer* to execute process against foreign ministers,—such attempt being declared an offense against the law of nations—for violation of a safe-conduct of the United States, for a great variety of crimes and misdemeanors occurring in places subject to the exclusive jurisdiction of the United States, and finally for an attempt to rescue persons in the custody of federal courts or to obstruct the process of the federal courts "in any manner." These last provisions, at least, rest exclusively upon the necessary and proper clause.

Nor did the Supreme Court hesitate to uphold legislation of this character. The great leading case is that of *United States v. Coombs,*[16] which did not arise, significantly, until 1838 and, therefore, until after Marshall's death. Defendant had been indicted under the act of March 3, 1825, "more effectually to provide for the punishment of certain crimes against the United States." His offense was the theft of certain goods belonging to a British vessel which had been cast away on a shoal of sea, on the coast of the State of New York. As the goods had been carried by wind and wave

[15] 1 Stat. L. 112. [16] 12 Pet. 78.

above the high-water mark and, therefore, beyond the admiralty jurisdiction of the United States, defendant's counsel urged that the crime occurred within the exclusive jurisdiction of the State. This argument was answered by Attorney-General Butler, by basing the act upon the power of Congress to regulate commerce, which "necessarily includes the power to protect the goods which are the subject of commerce, and it is of no consequence whether the commerce is foreign or domestic." The opinion of the unanimous Court was delivered by Justice Story, who pointed out that the act of 1790, with reference to piracies and felonies, did not confine itself to these offenses solely when committed on the high seas but also punished offenses on land in connection therewith, that a series of acts having reference to the collection of the revenue punished offenses within the borders of the States, that the ship registry act of 1792, the act of 1793 for the enrollment of vessels in the coasting trade and the fisheries, and numerous other acts, did the same.

"We do not hesitate therefore," the Court continues, "to say that in our judgment the present section is perfectly within the constitutional authority of Congress to enact, although the offense provided for may have arisen on land." And again: "It has been suggested that there is not the same *necessity* for the interposition of Congress in the case of the offense . . . when committed on land . . . because (then) the offense is or may be recognizable by the State judicatories, under the State laws. . . . (But) *it*

could scarcely be deemed prudent or satisfactory wholly to rely upon State legislatures or State laws for the protection of rights and interests specially confided by the Constitution to the authority of Congress."

The doctrine thus laid down received confirmation twelve years later in *United States v. Marigold,*[17] where it was ruled that the United States, by necessary implication from its power to coin money, has the power to punish the importation of fraudulent coins and their circulation. A little previous to this decision, the Court had ruled in *Fox v. Ohio,*[18] that the States also might punish counterfeiting. This fact gave rise to an argument in the Marigold case against "double punishment." But, said the Court, there is no double punishment; each government punishes only the offense against itself.

A suggestive feature of the Marigold case is that the decision was rendered by Justice Daniels, one of the two strictest constructionists on the Bench. And this circumstance calls attention to the exact difference between Marshall and his successors upon the question of "implied powers." That difference is often represented to turn upon the construction to be given to the words "necessary and proper" of the constitutional clause. It can be better stated, however, by saying that Marshall put his stress upon the word "*all*" of that clause, while his successors emphasized the phrase "*for carrying into exe-*

[17] 9 How. 560. [18] 5 How. 410.

cution." This point is well brought out by a passage in Justice Baldwin's "View," where the writer protests against the construction given to the clause in question in *McCulloch v. Maryland,* thus:

"In my opinion this power is weakened by making it by construction an implied and not an express power and extending it *to other objects than those of execution.* . . . In referring it to the means of execution, by the assumption of jurisdiction over non-enumerated subjects, there necessarily arises a collision of opinions about the degree of necessity, *and what, by the intent of the Constitution, was a discretionary power lodged in Congress becomes a matter of opinion."* [19]

The usual disposition, therefore, even of strict constructionism to leave the General Government the power of executing and enforcing all its granted powers, through legal agencies of its own creation, independently of the States, becomes plain.

Still, up to the time of the Civil War, congressional penal legislation was confined within modest limits. The war, the exigencies attendant upon raising a vast army largely by voluntary enlistment from a population that was by no means unanimously loyal, subsequently the necessity of preventing frauds in connection with the pension system which the war produced, and finally the business of enforcing the provisions of the Amendments that the war added to the Constitution,—all these circum-

[19] View 106 ff.

stances resulted in Congress putting out, between 1865 and 1875, a formidable grist, not only of penal legislation, but also of other legislation *instructive of the character of the National Government as a sovereign government within the range of its powers, and of its capacity, therefore, to control all the persons and things within the territorial limits of the United States by all means necessary and proper for the carrying of those powers into execution.*

More important still, however, is the fact that not all of this legislation is to be regarded exclusively or even predominantly from the point of view of securing the powers of the National Government, but rather from the point of view of *assuring individual rights* under the Constitution and laws of the United States. True, the great bulk of such legislation, being based upon a view of individual rights under the Fourteenth Amendment which the Supreme Court rejected in the *Slaughter-House* and ensuing decisions,[20] fell to the ground. But some of it survived, among it being the important section 5508 of the Revised Statutes, the substance of which is furnished in the following extract:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States,

[20] U. S. *v.* Cruikshank, 92 U. S. 542; U. S. *v.* Reese, *ib.*, 214; U. S. *v.* Harris, 106 U. S. 629; Civil Rights cases, 109 U. S. 3.

or because of his having exercised the same . . . they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

This section, we shall see, has been steadily upheld, and that entirely independently of the Fourteenth Amendment. But if Congress may thus come to the support of the rights of citizens of the United States under the laws of the United States with penal legislation, why may it not also come similarly to the support of the rights of aliens within the United States under treaties of the United States? The question answers itself.

But let me summarize some of the decisions upholding and applying the legislation just referred to. In *Nashville v. Cooper,*[21] 1867, the Court upheld, upon the basis of the precedents of *Martin v. Hunter, Cohens v. Virginia,* and *Osborne v. the Bank,* the act of Congress providing for the removal of certain cases from State courts to United States courts. In *Stewart v. Kahn,* three years later, it held the Act of June 11, 1864, suspending the operation of statutes of limitation during the continuance of insurrection, to be applicable not only to cases in the federal courts but equally to cases in the State courts. Said Justice Swayne, speaking for the Court:

[21] 6 Wall. 247; 11 Wall. 493.

"Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined." *"The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. . . . What is clearly implied in a written instrument is as effective as what is expressed. . . . The act is within the canons of construction laid down by Chief Justice Marshall."*

Still more pertinent to our inquiry is the decision in *United States v. Hall,*[22] which occurred in 1878. By sections 12 and 13 of the Pension Act of July 4, 1864, Congress had declared the embezzlement or fraudulent conversion to his own use by a guardian of the money which he had, in behalf of his wards, received as a pension due to them, to be an offense against the United States, and had imposed penalties. In objection to the law, it was urged that it was

"municipal in character, operating directly on the conduct of individuals and that it assumed to take the place of ordinary State legislation . . . that matters of police regulation are not surrendered to Congress, but are exclusively with State legislation."

The Court, however, upheld the law, pointing out that from the outset Congress as an item of its mili-

[22] 98 U. S. 343; preceded by U. S. *v.* Fairchilds, 1 Abb. 74, and U. S. *v.* Marks, 2 Abb. 541. See also U. S. *v.* Fox, 95 U. S. 670; U. S. *v.* Curtis, 106 U. S. 371.

tary powers had granted pensions and had endeavored to protect the funds thus bestowed by penal legislation. On the general constitutional question the Court spoke as follows: "*The power of Congress for the protection of both persons and things (is) . . . co-extensive with their powers of legislation.*"

In *Tennessee v. Davis,*[23] decided in 1879, the question was again raised, as to the power of Congress to provide for the removal of certain cases from State courts to the United States courts,—in this particular case the removal of a United States officer charged with murder under the laws of Tennessee. "The argument so much pressed upon us," said the Court, in its decision upholding the removal, is "that it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the General Government, the trial of prosecutions for alleged offenses against the criminal law of a State." But, the Court rejoins: over the subjects intrusted to the United States "the sovereignty of the States has ceased to exist."

"*The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States.* While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. *No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, ob-*

[23] 100 U. S. 257.

struct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

Four years later occurred the very important decision in *ex parte Yarbrough*,[24] in which the Court ruled that the right of a voter in federal elections is a right which, though arising immediately from State law, is based ultimately upon the Constitution and that "Congress has constitutional power to pass laws for the free, pure, and safe exercise of this right." Accordingly, section 5508 of the Revised Statutes was ruled to be applicable to a case in which persons were held for conspiring to intimidate a citizen of African descent in the exercise of his right to vote for a member of Congress. It is true, that in part the Court based its decision upon the proposition that the voter in the exercise of his franchise is part of the political machinery of the United States, and that the National Government has the right to protect its functionaries in the performance of their duties, but it also avails itself of the broadest principles. Thus at the close of his opinion, Justice Miller, speaking for the unanimous Court, writes thus:

"But it is a waste of time to seek for specific sources to pass these laws . . . '*the Government of the United States was created by the free voice and joint will of the people of America for their common de-*

[24] 110 U. S. 651.

fense and general welfare. . . . It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness.'" [25]

But if the general purport of *ex parte Yarbrough* can be contended to be doubtful, the same is not the case with *United States v. Waddell,*[26] which was decided the year following and in which it was ruled that the penalties imposed by section 5508 were applicable in the case of one who had conspired to prevent a citizen of the United States from making a homestead entry under United States laws. The general doctrine is, therefore, definitely established that Congress may enact penal legislation for the protection of citizens of the United States in the possession and exercise of rights secured to them under the Constitution and laws of the United States.

But sweeping as is the power thus claimed for Congress, it can still be asserted, I think, that the decisions just passed in review flow very directly from doctrine that has never been authoritatively challenged. On the other hand, however, they inevitably suggest the query, whether, though starting from an innocent enough source, the stream itself has not risen so high as to have swept away certain earlier confining barriers: particularly whether it has not swept away the distinction set up by Justice Bald-

[25] Quoting from I Kent Coms., 201.
[26] 112 U. S. 76.

win in his "View" and repeated by Justice Daniel in the *Passenger* cases, between powers of execution that are purely "subsidiary" and powers which though easily relatable on the score of convenience to the enumerated powers of the National Government are not among those powers since they are "substantive" in character. It seems that such is exactly the case. For not only is Marshall's doctrine of implied powers as stated in *McCulloch v. Maryland* repeatedly referred to with approval by the Court in the foregoing decisions, but the specific items of power which both Baldwin and Daniel had it in mind to withhold from the United States by their alleged distinction have been in the interval occupied by these decisions or shortly thereafter definitely ruled to belong to the National Government.

Thus one such item was undoubtedly the power to charter corporations in the furtherance of the enumerated powers of the National Government. That Congress had this power was precisely one of the two points decided in *McCulloch v. Maryland,* against which decision Justice Baldwin directs his shafts, the other point being that a State could not tax the corporations thus chartered. But both these points are again involved and are again decided in favor of the national pretensions in *California v. the Pacific Railroad Company,*[27] the date of which is 1888.

A point more insisted upon by Justice Baldwin,

[27] 127 U. S. 1.

however, was the contention that the National Government had no power of eminent domain save that recognized as belonging to it by the terms of Article I, section 8, paragraph 17, of the Constitution, where it is provided that Congress shall have power to provide "*exclusive legislation*" for the seat of government and "over all places purchased by the *consent of the legislature* of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings": that is to say, *no* power of eminent domain at all without the preliminary consent of some State legislature.

[Thus, he writes:] "the United States could have neither a right of soil or jurisdiction, propriety, or dominion, within any particular State, but by a cession from the State by its legislature or a convention of the people;" [28]

which certainly is the doctrine of State interposition or State consent, with a vengeance!

Obviously, this is a quite unwarrantable interpretation of the constitutional provision just quoted, which is conferring, not the power of eminent domain or any other *particular* item of power, but the *sum total* of governing power, in the places acquired by the United States in accordance with its prescriptions. Nevertheless, that the United States had no power of eminent domain save that conferred upon

[28] View 83.

it as an item of its exclusive powers, within places acquired in accordance with the provision of Article I, section 8, paragraph 17, was twice ruled by the Supreme Court anterior to the Civil War, namely, in *New Orleans v. the United States,*[29] which was decided in 1836, and in *Pollard's Lessee v. Hagan,*[30] which was decided in 1845. But what makes these cases especially interesting from our point of view is the circumstance that in both of them it was urged in support of the national authority that the particular exercise of national power under consideration had been undertaken or was sought to be undertaken, in execution of a trust incurred by a treaty, in the earlier case by the Louisiana Purchase Treaty of 1803, in the later case by the Florida Treaty of 1819. But, said Justice McLean, on the former occasion: "The Government of the United States . . . is one of limited powers . . . Congress cannot by legislation enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power." Louisiana is a sovereign State, equal with the other States of the Union. "By consequence, no jurisdiction of the Federal Government, either for purposes of police or otherwise, can be exercised over" the ground in controversy, "which is not common to the United States." It belongs, therefore, "to the local authority to enforce the trust" in question, "and prevent what they shall deem a violation of it by the city au-

[29] 10 Pet. 662. [30] 3 How. 212.

thorities." In other words, where the carrying out of a treaty provision involved an exercise of the power of eminent domain, it must be left with the State authorities.

And the doctrine implied in *Pollard's Lessee v. Hagan* was the same. The question at issue was the validity of certain congressional grants confirmatory of earlier Spanish grants, of certain lands lying along the west bank of the Perdido River in the State of Alabama. In support of the congressional grants claimant adduced the Treaty of 1819 as the source of the right and the duty of the United States in the premises. But, said the Court,

"The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or *eminent domain within the limits of a State or elsewhere, except in the cases in which it is expressly granted.* If it were true that the United States acquired the whole of Alabama from Spain, no such consequences would result as those contended for. It cannot be admitted that the King of Spain could by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have the capacity to receive power to exercise them. Every nation acquiring territory by treaty or otherwise must hold it subject to the Constitution and laws of its own government and not according to those of the government ceding it."

To Justice McLean's general proposition relative to the treaty-power's inability to extend the field of

federal jurisdiction, we shall have to pay some attention in the following chapter. The point to be noted here is, that the specific doctrine of these decisions, that the United States has no power of eminent domain save that which is given it by the Constitution in express terms, is to-day overruled. The leading case is that of *Kohl v. the United States*,[31] decided in 1875, from Justice Strong's decision in which, spoken for the unanimous Court, I quote the following passage:

"it has not been seriously contended during the argument, that the United States Government is without power to appropriate lands and other property within the States for its own uses and to enable it to perform its proper functions. *Such an authority is essential to its independent existence and perpetuity. . . . If the right to acquire property for such uses may be made a barren right . . . by the action of a State . . . the government is dependent for its practical existence upon the will of a State. . . . This cannot be . . . That Government (of the United States) is as sovereign within its sphere as the States are within theirs.*"

The same doctrine is repeated in *Cherokee Nation v. the Southern Kansas Railway Company*,[32] decided in 1890, and in *Luxton v. the North River Bridge Company*,[33] decided in 1894, in which cases, moreover, it is ruled that Congress may confer its power upon a railroad company.

[31] 91 U. S. 367. [32] 135 U. S. 641. [33] 153 U. S. 525.

But the doctrine laid down in *Kohl v. the United States* does not represent the only nor even, perhaps, the most significant infraction during the period under review of precedents resting upon the State sovereignty basis. More noteworthy, though less fruitful to date of actual result, is the doubt that is cast by the decision in *ex parte Siebold* [34] upon the important precedents of *Prigg v. Pennsylvania* [35] and *Kentucky v. Dennison.*[36]

In both these cases the same point was at issue, namely, the right of the United States as a "necessary and proper" measure in the carrying out of its enumerated powers to control the organs of State government. Of the original view upon this point there can be little question. On the one hand, as Marshall put it in *McCulloch v. Maryland,* "no trace is to be found in the Constitution of an intention to create a dependence of the Federal Government on the governments of the States for the execution of the great powers assigned to it"; but on the other hand, this circumstance was never thought to infer a correlative independence on the part of the State governments and their various agencies of all control by the United States. Indeed quite the contrary seems to have been the case. Thus not only does the Constitution require an oath of fidelity from State officers as well as from United States officers; but, as was pointed out in Chapter III, it was the earnest desire of the champions of State

[34] 100 U. S. 371. [35] 16 Pet. 539. [36] 24 How. 66.

rights themselves on the floor of the Convention, that the General Government should not establish inferior courts at all, but should use the State courts as its courts of first instance in all cases. Moreover, this point of view was deliberately met, to a degree, by the Judiciary Act of 1789. Twenty-five years later, however, the constitutionality of this act was challenged by the apostles of State sovereignty at the very point where the State jurisdiction had been most carefully preserved. And how was that challenge met? We have just quoted Chief Justice Marshall's words: in effecting its objects, the *National Government can "legitimately control all individuals or governments within the American territory. . . . These States are constituent parts of the United States . . . for some purposes sovereign, for some purposes subordinate."*

Equally striking, however, with the Judiciary Act in this connection are certain other enactments of early Congresses. Thus State courts were authorized to entertain proceedings by the United States itself, to enforce penalties and forfeitures under the revenue laws, and to hear allegations, and take proofs, if application were made for the remission of such forfeitures.[37] Again, pursuant of the same idea of treating the State governments as available to the National Government for certain administrative purposes, the act of 1793 intrusted the rendition

[37] J. Field, in *ex parte* Clark (dissenting), 100 U. S. 399, 411.

of fugitive slaves in part to national officials and in part to State officials, and the rendition of fugitives from justice, from one State into another, entirely to the State executives.

But it was exactly in connection with the provisions of the Act of 1793 with reference to the rendition of fugitive slaves that the early point of view was first decisively set at naught; and in *Prigg v. Pennsylvania* that act, so far as it assumed to control and direct State officers, was pronounced unconstitutional upon the basis of the following doctrine, stated in the words of Justice Story: "The National Government, *in the absence of all positive provisions to the contrary,* is bound, through its own departments . . . to carry into effect all the rights and duties imposed upon it by the Constitution." True, State officers and State agents might be employed, but always under such conditions as the States might severally attach to their acting, and without legal responsibility to the national authorities. This was in 1842. In 1861, just previous to the outbreak of war, the Court afforded great momentary satisfaction to the secessionists by its further application of the same general principles in *Kentucky v. Dennison.* In this case the Governor of Ohio having refused upon a proper demand to surrender a fugitive from justice from Kentucky, the Governor of the latter State applied to the Supreme Court for a mandamus to compel the performance of what the Act of 1793 designated a

"duty." The Court refused the writ. "We think it clear," it said, "that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."

And thus the law stood until 1879, when, by the above mentioned decision in *ex parte Siebold,* a long step was taken by way of return to the earlier doctrine. In this case, it was ruled that Congress, by virtue of its power under Article I, section 4, of the Constitution, had the right to make it a penal offense against the United States for any State officer of election, at an election held for a representative in Congress, to neglect to perform, or to violate, any duty in regard to such election, whether required by a law of the State or of the United States. The proposition upon which those opposed to the power of Congress in the premises relied was, that if Congress assumed to regulate the subject at all, it must regulate it exclusively and act entirely through national officials. Said Justice Bradley, speaking for the Court:

"As a general rule, it is no doubt expedient and wise that the operations of the State and National Governments should, *as far as practicable,* be conducted separately, in order to avoid undue jealousies and jars. . . . *But there is no reason for laying this down as a rule of universal application.* It should *never* be made to override the plain and manifest dictates of the Constitution itself. *We cannot yield to such a transcendental view of State sovereignty.*"

It is true that Justice Bradley endeavors to distinguish *Kentucky v. Dennison,* but his argument upon the point is both very brief and also very unconvincing. Contrariwise, he instances the case of

"a State judge having power under the naturalization laws, to admit aliens to citizenship: suppose such a one," he says, "should utter false certificates of naturalization, can it be doubted that he could be indicted under the act of Congress providing penalties for that offense . . . ?"

But, *ex parte Siebold* is also important in a less surprising way; since it afforded the Court opportunity to assert afresh the sovereign character of the National Government within the range of its powers.

"It is argued," Justice Bradley's opinion recites, "that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States. *Here again we are met by the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it.* . . . This power to enforce its laws and to execute its functions in all places

does not derogate from the power of the State to execute its laws at the same time and in the same places. *The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield.* 'This Constitution, and all the laws which shall be made in pursuance thereof . . . shall be the supreme law of the land.'"

And thus much for Congress' power to pass all laws necessary and proper to carry into execution the delegated powers of the United States, even to the extent of utilizing, on occasion, the agencies of government created by the States themselves. Leaving, however, this particular, more or less controversial, item of Congress' power out of consideration, I think we are warranted from this review of decisions, reaching from the *United States v. Fisher* to the *United States v. Waddell,* in stating the following conclusion: namely, that by virtue of Article I, section 8, paragraph 18, of the Constitution, taken in conjunction with Article VI, paragraph 2, Congress has power to pass any laws that are necessary and proper for carrying into execution the powers of the United States, and is in no wise restricted by the existence of the police powers in the States; that it has, in fact, the same powers in this connection that it would have under the Constitution as it stands if the States did not exist; that the only question that can be raised with propriety with reference to an act of Congress passed by virtue of the necessary and

proper clause, assuming such act not to transcend any of the specific prohibitions upon national power in the Constitution, *is whether,* from the point of view of the granted power to be subserved thereby, *it is a necessary and proper act.*[38]

But one further contingency presents itself. Suppose an exigency arises which it were well within the power of Congress to provide for, but for which it has, in fact, not provided, and suppose further that the exigency is of so instant and overwhelming a character as to admit of no delay. In those countries, whose constitutions arise from monarchical foundations, the executive would have the capacity to act in such a situation, in accordance with its best discretion, though not, of course, to the actual transgression of law. Our question is, therefore, this: does the national Executive of the United States, using that term in a broad sense to include both the President and the federal courts, or either, possess any such capacity? The decisions in the cases of *Neagle* and *Debs*[39] answer this question in the affirmative; and more than that, they also settle the supremacy of the capacity in question over any conflicting State power or jurisdiction whatsoever. Thus, in the former case it was held that where a man

[38] See also Wayman *v.* Southard, 10 Wheat. 1, Weston *v.* Charleston, 2 Pet. 449, and Dobbins *v.* Commissioners, 16 Pet. 435. The last is remarkable for the strong reiteration by J. Wayne at that relatively late date (1842) of the doctrine of McCulloch *v.* Maryland in respect to national supremacy.

[39] 135 U. S. 1; 158 U. S.

who was attacking a Supreme Court justice on circuit, was killed by a United States marshal, the latter, upon being arraigned for murder by the State of California, was entitled to release on *habeas corpus* by the federal courts, though he was able to plead in justification of his act no specific law of Congress, but only his appointment by the President by virtue of the latter's constitutional authority to "take care that the laws be faithfully executed." And the decision in the *Debs* case, in which was drawn into question the validity of an injunction by a United States circuit court prohibiting a sympathetic strike whereby interstate commerce and the mails were interrupted, took an even broader sweep. Not only was the injunction upheld, but also the Court took occasion to comment favorably upon the despatch of troops by the President to the scene of the disturbance, a course which the President had taken upon his own motion and not only without awaiting an application from the State authorities but in the face of their violent protest.

And what was the doctrinal foundation of these decisions? It is indicated in the following passage from Justice Brewer's opinion, in the *Debs* case:

"We hold that the Government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of

sovereignty; that to it is committed the power over inter-state commerce and the transmission of the mail; . . . that in the exercise of those powers it is competent for the nation to remove all obstructions . . . to the passage of inter-state commerce or the mail," either "through the executive branch and in the use of the entire executive power of the nation," *or through the civil courts by invoking "the powers of these courts to remove or restrain such obstructions . . . by injunction.*"

No less an authority than ex-President Taft has recently interpreted this doctrine to signify that the national courts may in proper cases—involving, that is, property rights—exercise the power of injunction to secure "*any widespread public interest*" that is intrusted by the Constitution to the National Government. But among such widespread public interests is that attaching to our international relations. Said Justice Miller, in *Neagle's* case, the executive power of the United States includes "the rights and obligations growing out of the Constitution itself, *our international relations,* and all the protection implied by the nature of the government under the Constitution."

CHAPTER X

THE ENFORCEMENT OF TREATIES

With these general principles in mind, establishing the competence of the United States to carry its powers into execution throughout the territory subject to its jurisdiction, let us turn to consider the matter of treaty enforcement rather more immediately; not so much, however, with a view to seeking confirmation of the doctrine already sufficiently amplified as with a view to discovering whether such doctrine has ever been pronounced authoritatively to be inapplicable in any particular to the case of treaties.

A treaty duly made within constitutional limits is law, and as was determined in the case of the Peggy,[1] private rights may accrue under it. Accordingly it was Congress's first concern to provide a forum for the enforcement of such rights. Thus by the Judiciary Act of 1789,[2] it was provided, first that suits for tort "only" in violation of the law of nations or of a treaty of the United States might be instituted in the district courts of the United States; secondly, that suits of a civil nature at common law

[1] U. S. *v.* Schooner Peggy, 1 Cranch 103. See also Foster *v.* Neilson, 2 Pet. 253.

[2] 24 September, 1789, 1 Stat. L 76, 78, 85.

or in equity, to which an alien was a party, might be instituted in the circuit courts of the United States if the sum of five hundred dollars was involved; and thirdly, as we have already seen, that where a right claimed under a treaty was denied by a State court having final jurisdiction of the case, an appeal should be had to the United States Supreme Court. Ninety-nine years later the second of these provisions was supplemented by an enactment extending the jurisdiction of the federal courts to civil suits arising under the Constitution, laws, and treaties, where the amount involved was two thousand dollars, which limit was also applied to the earlier jurisdiction, and providing further that where suits of the kind just described had been begun in a State court, they could be removed to the federal court of proper jurisdiction upon motion of defendant.[3]

Meantime, aliens had come to share the benefits of the legislation which Congress had enacted in enforcement or supposed enforcement of the Fourteenth Amendment. Thus by the Act of 20th April, 1871 (R.S., section 1979),[4] any person who, under color of any statute, law, or usage of a State, subjected "any citizen of the United States *or other person*" within the jurisdiction of the United States to a deprivation of rights secured by the Constitution and laws was rendered liable in an action at law or a suit at equity; while by the act of May 31,

[3] 13 August, 1888, 25 Stat. L 433. [4] 17 Stat. L 13.

1870,[5] any such person subjecting "any inhabitant" of a State or territory to such deprivation was pronounced guilty of misdemeanor and liable to fine and imprisonment. More sweeping still were the provisions of chapter 22, section 2, of the Act of April 20, 1871 (R.S., section 5519), which ordained that "if two or more persons" shall conspire "for the purpose of depriving directly or indirectly any *person or class of persons* of the equal protection of the laws, or of equal privileges and immunities under the laws," each of such persons shall be deemed guilty of a misdemeanor and subject to certain fines or terms of imprisonment or both. In the *United States v. Harris*,[6] however, on the basis of the interpretation of the Fourteenth Amendment set out in Chapter VII, these provisions were held unconstitutional. The basic error made by their enactors, according to the reasoning of the Court, was in assuming to punish private individuals for doing what a State is forbidden by the Fourteenth Amendment to do. Had they merely forbidden private individuals to do what by the earlier act they had forbidden those acting under color of State authority from doing, their work would have been undoubtedly valid.

We turn now to a second class of enactments. The statutes just reviewed were passed by Congress primarily as "necessary and proper" measures for carrying the judicial powers of the United States

[5] R. S., Sec. 5510. [6] 106 U. S. 629.

into execution, or as "appropriate legislation" for carrying into effect the prescriptions of the Fourteenth Amendment. Statutes, however, like the Act of 2d March, 1829, and that of 24th February, 1855, providing for the better carrying into effect of certain stipulations of consular conventions of the United States[7] and, in part, the Trade-Mark Acts of 1870 and 1876,[8] rest upon Congress' power in the enforcement of treaties. But a more important instance still of this type of statute is supplied by the Extradition Act of 12th August, 1848,[9] which rests *exclusively* upon the basis just indicated and, therefore, represents unmistakably the entrance of Congress into a field opened to it by existing treaty provisions.

It will be observed that the act in question was not passed till nearly sixty years after the Constitution went into operation. This circumstance is explained by two facts: first, that extradition agreements were very exceptional in those early days, and secondly, that the President exercised the right to carry such agreements into effect directly, without the intervention of Congress. Thus in the early case of *United States v. Jonathan Robbins*[10] the court refused a writ of *habeas corpus* to an alleged murderer and deserter whom President Adams had ordered

[7] R. S., Sec. 5280; 4 Stat. L 359, and 10 *ib.* 614.
[8] 16 Stat. L 210; 19 *ib.* 141; also Act of March 3, 1881, 21 Stat. L 502.
[9] R. S., Secs. 5270-80.
[10] Bee's Admr. 266 (cited by Butler).

surrendered to the British consul, in conformity with the provisions of the Treaty of 1794. The action of both the court and the President gave rise in the House of Representatives to a long drawn-out and rather acrimonious discussion. The points of contention, however, were merely whether Robbins was, as he alleged, a citizen of the United States and whether the court did right to obey the order of the President without inquiry into this allegation; but no one denied that the treaty was operative without additional legislation. Upon both the points stated, furthermore, the administration was eventually sustained, owing in part at least to a brilliant speech by Marshall, who showed, first, that whether Robbins was an American citizen or not, as a murderer he was subject to the provisions of the treaty, and secondly, that the surrender was an executive and not a judicial act.[11]

In 1845, in the case of the *British Prisoners*,[12] the same doctrine was adhered to by Justice Woodbury, on circuit. Said the court: "If a treaty stipulated for some act to be done, entirely judicial . . . it could hardly be done without the aid or preliminary direction of some act of Congress prescribing the court to do it and the form. But where the aid of no such act of Congress seems necessary in respect to a ministerial duty, devolved on the executive by the supreme law of a treaty, the exe-

[11] Benton, Abridgment, II, 457-69.
[12] 1 Wood. and Min. (U. S. Ct. Ct.) 66.

cutive need not wait . . . for acts of Congress to direct such duties to be done and how." In the *Metzger* case, again, which was decided in 1847, the same doctrine was once more reiterated. At this point, however, a complication arose because of the action of Justice Edmonds of the New York supreme court in according the prisoner a writ of *habeas corpus* and subsequently discharging him, upon the ground that the treaty involved, that of 1843 with France, had never been put into operation by legislation.[13] In order to prevent a recurrence of the episode, Congress the next year passed the statute under review.

The terms of the statute are as follows:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, or judge of a court of record of general jurisdiction of any State, may upon complaint made under oath, charging any person found within the limits of any State, district, or territory, with having committed within the territory of such foreign government, any of the crimes provided for by such treaty or convention, issue its warrant for the apprehension of the person so charged, with a view to a hearing of the evidence against him. If such hearing reveals sufficient evidence to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same to the Secretary of State, that a war-

[13] Butler, II, 81, footnote 3.

rant may issue upon the request of the proper authorities of such foreign government for the surrender of such person according to the stipulations of said treaty, and he shall issue his warrant for commitment of the person charged to the proper jail to await surrender."

I have already commented upon the character of the jurisdiction assumed by the United States by virtue of these extradition treaties over persons to be found within the limits of the States. It is, to all intents and purposes, criminal jurisdiction. Nevertheless, the right of the United States to do this has never been questioned; and the act of 1848 was passed practically without debate and by large majorities.

The only occasion on which an attempt at extradition has subsequently to the act of 1848 given rise to a fundamental question was in connection with the case of *Neeley v. Henkel,*[14] in which appellant denied the power of Congress to pass an act for the extradition of fugitives from justice from the United States to Cuba, which was then under the military control of the United States and with which, of course, no extradition treaty existed. The act was sustained by the Court upon two grounds: first, the military powers of the United States, and secondly, as a measure "necessary and proper" for carrying out the provisions of the Treaty of Paris of 1898, pledging the United States to secure the protection of

[14] 180 U. S. 109.

property in Cuba during American occupation of the island. Said Justice Harlan:

"The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in Section 8 of Article I of the Constitution, as all others vested in the Government of the United States, or in any department or officers thereof, *includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President, by and with the advice and consent of the Senate to insert in a treaty with a foreign power.*"

But even earlier than the act of 1848, Congress had taken what, from the point of view of State rights, was a far more serious step. I refer to its passage of the Act of August 29, 1842,[15] by which, in order to prevent a repetition of the complications that arose in connection with the famous McLeod affair of the year previous,[16] it was provided that when subjects of foreign nations were in custody of a State "on account of any act done or omitted to be done" under alleged authorization of any foreign state or government, "the validity of which depends on the law of nations," the Justices of the Supreme Court and judges of the district courts shall have power to issue writs of *habeas corpus* for such persons, and in proper cases to grant their discharge; and further that any pro-

[15] 5 Stat. L 539.

[16] Moore, II, 24.

ceeding by the State in the interval against such persons shall be deemed null and void. But, in its original form, as it came from committee, the measure was of even broader range, providing also for the cases of "prisoners in jail committed under any authority or law of the United States *or any of them,* on account of any act done or omitted to be done, under or by virtue of the Constitution, or any law, or treaty of the United States." Eventually this latter provision was stricken out, without, however, greatly lessening the objectionable character of the measure to the advocates of State rights.[17]

Thus we find Walker of Mississippi descanting upon the measure thus:

> "It places here the central sun of light and heat. Sir, I desire no such central sun. . . . And when I behold the azure banner of this United States and view there the stars which represent the sovereign States forming a noble constellation . . . I see there all the light and all the power which we, as representatives of the States possess to carry out the great objects for which the Constitution was framed."

And he added that instead of providing for the punishment of an offender against the law of nations, the act took an offender out of the reach of punishment.

Buchanan of Pennsylvania was still more emphatic:

[17] For debate see the *Globe*, 2d Sess., 27th Cong., XI, 443-4 and 730; and Append., 554-8.

"Why shall the whole criminal jurisdiction be jeoparded to meet a single case?" On the plea allowed by the bill, "the original jurisdiction is to be taken from the State, by an interposition of a district judge. . . . The power of the State is palsied at once, and falls dead at the feet of a mere district judge, on the application of the accused."

But the weightiest protest came from Calhoun, and was based upon the supposed dual nature of the federal system:

"If there be any one principle," said he, "in which all parties and all writers on the Constitution are agreed, it is that the government of the States and that of the United States are each independent of each other, and, in their respective spheres, supreme as regards each other. This great and fundamental principle has, for the most part, been held sacred as regards the legislative and executive departments, but not so the judiciary. From the beginning it has been departed from in that department. Even the Judiciary Act of 1789 departed more or less from it; but the departure was slight compared to what has since taken place, and is proposed by this bill. . . . As far, then, as the judiciary is concerned, the work of consolidation would be consummated, if this bill should pass, and that would lay the solid foundation to consummate it in the other departments of the Government."

The argument in behalf of the measure was presented by Berrien of Georgia. It was based upon two propositions: first, that "the jurisdiction over foreign relations in every possible incident devolves

on this Government"; secondly, that the measure was one necessary and proper for carrying this jurisdiction into effect. He refused to accept any distinction between the power of the federal government to control so far as necessary for its own purposes the civil jurisdiction of the States and their criminal jurisdiction; and in support of his position cited *Cohens v. Virginia* and *Worcester v. Georgia,* and also the Act of 1833, which was passed at the time of the Nullification excitement in South Carolina, to provide for the removal of prosecutions begun in a State against a revenue officer of the United States,—the act which was the prototype of the statute upheld in *Tennessee v. Davis.*

The advocates of the measure were able to talk from the book. On the other hand, there can be equally little doubt that from the premises of the doctrine of rights absolutely reserved to the States, the Act of 1842 was utterly reprehensible; and the same, of course, is to be said of the Act of 5th February, 1867,[18] extending the writ of *habeas corpus* to prisoners in jail, when "in custody in violation of the Constitution or of a law or treaty of the United States." With such palpable infractions of the most vital of the State's police powers, its powers of penal legislation and enforcement, established to be valid as resting upon the treaty-power, *there can be absolutely no reason of a constitutional nature why Congress should not enact*

[18] R. S., Sec. 753; 14 Stat. L 385.

laws for the punishment of violations of the treaty rights of aliens, whether by private persons or by persons claiming State authorization. On the contrary, with its possession of the power a matter of no possible doubt, there is the strongest of reasons supplied by the consideration of preserving good faith with those who enter into treaty relations with us, why Congress should enact such legislation. And this reason in turn, because of the sanction it receives from International Law, comes to have a quasi-legal force which, in the course of time, may make itself felt by the too stolid consciences of our national legislators. That the government of Great Britain "could not justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed," was the fundamental proposition upon which the United States rested its case before the Geneva Tribunal in 1872, as it was also the basis of that Tribunal's award in favor of the United States in the matter of the Alabama Claims.[19] But international arbitration is a growing idea. Since 1907 the United States has become party to a score or more of arbitration treaties. Of the sincerity of this government's devotion to the principle of the juridical settlement of international disputes there would seem, therefore, to be no doubt. But this being the case, the United States cannot afford to multiply the occasions of its acountability before the world's tribunal by the crassest sort of

[19] James Brown Scott, "Cases on International Law," 717.

negligence to provide the proper legal machinery for carrying its treaty obligations into effect.

The particular point, of course, at which it becomes of highest importance that the United States shall undertake the punishment of violations of treaty rights of aliens is that point at which the local jurisdiction of the States falls down most completely, namely where the violations in question are due to mob violence supported by a dominant and widespread prejudice. Questions of this sort first presented themselves to the National Government in connection with outrages against Chinese laborers. Such an outrage occurred in Denver, Colorado, in 1880.[20] In answer to China's protests against the inadequate way in which the law was being enforced by the State authorities against the perpetrators of the deed, Mr. Evarts, Secretary of State, pleaded the inability of the National Government "to interfere in regard to the administration . . . of the municipal laws of a State of the United States" save upon the application of the State itself. This is undoubtedly a correct statement of the case so far as it goes, but it obviously covers only half the ground. Also, Mr. Evarts refused to admit that the United States was in any wise liable at International Law for the outrage. Nevertheless, that the government eventually conceded a degree of responsibility in the premises is shown by Article III of the Treaty of 1880[21] (proclaimed October 5, 1881)

[20] Moore, VI, 820-2. [21] "Treaties and Conventions," 183.

with China, which stipulated that if Chinese laborers or other Chinese, either permanently or temporarily in the United States, should "meet with ill treatment at the hands of any other persons, the Government of the United States would exert all its power to devise measures for their protection."

Five years later occurred a fearful affray at Rock Springs, Wyoming Territory, in which twenty-eight Chinese were killed, fifteen wounded, and Chinese property valued at nearly one hundred and fifty thousand dollars was destroyed.[22] This time the administration was less quiescent. By its prompt action a similar riot was repressed in Washington Territory, and at its instigation an indemnity was paid to the Chinese government covering the property losses of its subjects in the Wyoming affair. This payment was made, however, "in a spirit of pure generosity," it was insisted, and was "in no wise to be held as a precedent." [23]

The credit for acknowledging both a degree of liability on the part of the United States for outrages of the kind under discussion and also for first recommending to Congress that it "make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the federal

[22] Moore, VI, 822-35.

[23] *Ib.*, 835. See also Art. V of Treaty of 1888, by which the U. S. agreed to pay China nearly $280,000 indemnity for injuries received by her subjects from mob violence. *Loc. cit.*, 836.

courts," belongs to President Harrison, in connection with his discussion in his Annual Message of December 9, 1891, of the lynching of eleven Italians at New Orleans the previous March.[24] In response to this recommendation, a bill was introduced in the Senate March 1, 1892, and was reported favorably March 30. It provided

"that any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country and constituting a crime under the laws of the State or Territory shall constitute a like crime against the United States and be cognizable in the Federal courts." [25]

The bill died on the calendar. Seven years later another lynching of Italians occurred in Louisiana, and President Harrison's recommendation was renewed by President McKinley, both in his annual message of 1899 and in that of 1900.[26] In the latter he put the case thus:

"I renew the urgent recommendations made last year that Congress appropriately confer upon the Federal courts jurisdiction in this class of international cases where the ultimate responsibility of the Federal Government may be involved. . . . *It is incumbent upon us to remedy the statutory omission which has led and may lead again, to such untoward results.*"

[24] *Ib.*, 839-40. [25] *Ib.*, 846.
[26] *Ib.*, 847. See also 848-9.

In his earlier message he had pointed out the precedent for the action he was urging. Such precedent, he urged,

"is rationally deducible from the existing statute which gives to the district and circuit courts of the United States jurisdiction of civil suits brought by aliens where the amount involved exceeds a certain sum. If such jealous solicitude be shown for alien rights in cases of merely civil and pecuniary import, how much greater should be the public duty to take cognizance of matters affecting the life and the rights of aliens under the settled principles of International Law, no less than under treaty stipulation, in cases of such transcendent wrongdoing as mob murder, especially when experience has shown that local justice is too often helpless to punish the offenders."

Despite this powerful plea, and though bills were again introduced, no final action was taken, and so the matter stands to-day.

Meantime, in 1886, an attempt had been made in the case of *Baldwin v. Franks* [27] to revive section 5519 of the Revised Statutes and make it do duty in cases of conspiracy to deprive an alien of his rights under treaty. The Court ruled, however, that even if the section were by its terms applicable to such a case, the features of it which were pronounced unconstitutional in *United States v. Harris* were so inextricably involved with its other features as to stamp the entire enactment with invalidity. But, on

[27] 120 U. S. 678.

the other hand, that the Court was of the opinion that Congress has the power, did it choose to exercise it, to penalize violators of treaty rights seems plain. Not only does Chief-Justice Waite's opinion contain the assertion that treaties are supreme law of the land and "as *binding within the territorial limits of the States as they are elsewhere throughout the domain of the United States,*" but the syllabus of the case opens with the positive statement that "Congress has power under the Constitution to provide for the punishment of persons guilty of depriving Chinese subjects of any of the rights . . . guaranteed them by the Treaty of November 17, 1880."

We are quite warranted then, I think, in concluding that no distinction has ever been established which would withhold from Congress the same power of penal enactment in the enforcement of treaties within the territorial limits of the United States which it admittedly has in the enforcement of the laws of the United States. We may, therefore, raise the more general question as to what is the limit of Congress' power to pass laws necessary and proper for carrying treaties into execution.

Said Justice McLean in *New Orleans v. United States,* the federal jurisdiction cannot be "enlarged under the treaty-making power"; and the words of Justice McKinley in *Pollard v. Hagan* were of similar import.[28] From one point of view this is sound

[28] 10 Pet. 662; 3 How. 212.

doctrine enough, but from another it is quite erroneous. That the President of the United States, two-thirds of the Senators present concurring, cannot make a treaty stipulating that Congress shall exercise legislative powers that it does not by the Constitution possess, goes without saying. But that, on the other hand, the treaty-power itself extends to many things to which the legislative power of Congress does not by the Constitution extend is also evident. And it is further evident that when a treaty has been once entered into upon one of these subjects, Congress may pass all laws necessary and proper for the carrying of such treaties into effect, although independently of the treaty Congress would have no power in the premises at all. Thus, of itself, Congress would have no power to confer judicial powers upon foreign consuls in the United States, but the treaty-power can do this and has done it repeatedly and Congress has supplemented these treaties by appropriate legislation. Again, Congress of itself could not provide for the extradition of fugitives from justice, but the treaty-power can and has done so scores of times, and Congress has passed legislation carrying our extradition treaties into effect. Again, Congress could not confer judicial power upon American consuls abroad to be there exercised over American citizens, but the treaty-power can and has, and Congress has passed legislation perfecting such agreements and

such legislation has been upheld.[29] Undoubtedly, too, to-day the treaty-making power might receive a cession of land in return for a stipulation that certain claims should be recognized, and Congress might enact laws recognizing and establishing such claims, whether they lay within a State or elsewhere. In a word, as just stated, the treaty-power cannot purport to amend the Constitution by adding to the list of Congress' enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures which independently of a treaty Congress could not pass at all; and the only question that can be raised with reference to such measures will be whether they are "necessary and proper" measures for the carrying of the treaty in question into operation, or for modifying such treaty, or, as was held in the *Head Money* and *Chinese Exclusion* cases, for abrogating it. Undoubtedly it may be objected, that the line thus drawn is a rather tenuous one. But to this objection there are two answers: first, that it is the same line that always separates Congress' enumerated powers from its "necessary and proper" powers; secondly, that the law, and particularly Constitutional Law, abounds in distinctions which, though of relatively little value for the cases that fall close to the line, are nevertheless ultimately of supreme value. Indeed, it may be said, that such is the usual nature of legal distinctions.

[29] *In re* Ross, 140 U. S., *cf.* Devlin, Sec. 152.

But one topic further remains, namely, the value of the precedent of *in re Debs* in connection with the matter of treaty-enforcement. This, perhaps, is a rather speculative topic, but, on the other hand, the general principle underlying that decision seems plain enough, namely, that the United States possesses adequate executive power to safeguard any large general interest intrusted to its keeping, even though Congress may have failed to provide the precise channels in which such executive power should flow. Applying this idea to the case of treaty-enforcement, I find that it has three consequences:

1. It sanctions the right of the executive to interfere with such force as may be necessary, at all times and places, not simply for the enforcement of judicial decisions determinative of alien rights under treaty, for that faculty of the executive were already plain, *but for the purpose of preventing an interference with such rights.*

2. It sanctions similarly the right of the federal courts to interfere by injunction, not merely upon the application of an alien whose property interests are menaced, but upon the application of the executive agents of the Government itself, to prevent injury to rights secured by treaty.

3. It constitutes from the raw material, so to speak, of the treaty pledges of the United States, a standard of public policy of which all courts should take cognizance in evaluating contracts and other juristic acts of private parties, and of which the

federal courts are obliged to take cognizance when adjudicating controversies between citizens of different States. And, indeed, this principle seems to have been recognized even anterior to the Debs case.[30]

But that one way or other the National Government has the power to adopt all measures "necessary and proper" for carrying its treaties into effect is not open to doubt. And the only question that can be raised with reference to such measures, assuming that they do not transgress the positive prohibitions of the Constitution, is whether, from the point of view of the constitutional interest to be served, they are "necessary and proper," nor can the judicial determination of this question be legitimately affected by the consideration that the States possess certain legislative powers which were not by enumeration conferred upon the National Government by the Constitution. This is a fact that may be given due consideration, from the point of view of policy and expediency, but legally it is of absolutely no weight whatsoever.

But now admit this statement of the matter,—and in view of the doctrine so strongly reiterated in the decisions reviewed in the chapter immediately preceding, it would seem to be beyond all controversy a correct statement—and an interesting confirmation ensues of our general doctrine with reference to the treaty-power. The point is this:

[30] Gandolfe *v.* Hartman, 49 Fed. 181. (Cited by Devlin.)

the power of Congress to pass laws necessary and proper for carrying treaties into execution rests, like the treaty-power itself, upon the Constitution. But it is admitted that this power of Congress is not limited by the existence of the police powers of the States. How, then, can the treaty-power, which rests upon precisely the same constitutional basis, be thus limited? It would be exceedingly anomalous to say the least, if a derivative power could override and set at naught that which the principal power was limited by. Of course, the Constitution sanctions no such paradox.

CHAPTER XI

SUMMARY AND CONCLUSION

In this chapter I shall first summarize the principal reasons believed to have been established in previous chapters, for holding that the treaty-power of the United States is not constitutionally restricted by the police powers of the States; and, secondly, consider whether any real peril for the police powers of the States resides in this doctrine.

1. *The Treaty-Power under the Articles of Confederation.*—Had the reserved rights of the States under the Articles of Confederation been deemed to limit the treaty-power, there would have been no treaty-power. But the fact is that, notwithstanding the reservation to the States of all the rights of "sovereignty and independence" not "expressly" surrendered by them in the Articles, at the single point at which it was desired to save State power from prejudice by the treaty-power, namely, with reference to commercial regulation, specific stipulation was entered to that end. An attempt is sometimes made to represent the treaty-power in the Articles of Confederation as theoretically broader than in the Constitution, inasmuch as, it is contended, the United States in the former case was acting for

sovereign States. But this is to deny that the United States under the Constitution is, in respect of the powers intrusted to it, itself a sovereign state. And it is strange doctrine, certainly, which contrives to utilize the fact of a general enlargement of the powers of the United States under the Constitution and its transformation from a supposed agency for sovereignties into a government in its own right to detract from the range of that power which it has possessed in its entirety from the outset.

2. *Article VI, paragraph 2, of the Constitution.*—By this paragraph of the Constitution, all treaties made under the authority of the United States are supreme law of the land, anything in any State constitution or law to the contrary notwithstanding; and to endeavor to limit the authority of the United States by an authority to which it is pronounced invariably paramount is merely absurdity. Nor does the Tenth Amendment at all diminish the efficacy of Article VI, paragraph 2. It simply declares the fact that the United States has only such powers as are delegated it, but does not purport to restrict the United States in the exercise of such powers as are delegated it. Among these delegated powers, however, is the power to make treaties, which is conferred without any express limitation as to subject-matter.

3. *The view taken of the Treaty-Power in the Convention of 1787 and in the State Ratifying Conventions.*—Not only did the federal Convention re-

fuse repeatedly to insert a provision in the Constitution saving the internal police of the State from the operation of national power, but with reference to the treaty-power itself, it was specifically recognized that it would have the power to cede territory lying within the States and to set aside State tonnage dues, although the right to levy such dues was at the very moment being explicitly reserved to the States. Furthermore, the Convention, far from believing that the treaty-power under the Constitution would be less strongly placed than it was under the Articles of Confederation, took particular pains to transfer the treaties that had been entered into by the Confederation to the indefeasible basis of the Constitution. The principal contest in the Convention upon the subject of treaties was over the question whether their ratification should be left to two-thirds of the Senators present or two-thirds of the whole number of Senators; and the explanation of this contest is to be found in the universal recognition of the scope of the power as it was being conferred, and its capacity to reach local and State interests, of which the Senate by its very make-up was designed to be the natural defender. In the State conventions the same broad view was taken of the treaty-power, and especially did the opponents of the Constitution consider its undefined character one of the most vulnerable points of the new system. With the single exception of Nicholas, in the Virginia Convention, however, the defenders of the new system urged only

such general limitations to the power as resided in its own nature, in the general restraints imposed by the Law of Nations and the natural rights of man, in the fact that in the business of negotiation the representatives of the United States would be imbued with a spirit of patriotism, in the fact that under the Constitution the power was to be "precisely the same" as under the Articles of Confederation, and finally in the fact that the Senate, designed "to all eternity" to resist consolidation, was to participate in the making of treaties.

4. *The decisions of the Supreme Court of the United States while still under the domination of the point of view of the Framers of the Constitution.*— The leading precedent is that of *Ware v. Hylton.* This is not to be disposed of by urging the circumstance that the treaty involved in that case was made under the Articles of Confederation. For the view of the Court was that it was the Constitution that supplied the treaty with its absolutely incontrovertible title to validity. Nor again, is either it or the ensuing decisions of *Fairfax v. Hunter* and *Chirac v. Chirac* to be disposed of by confining their operation to the particular question of private rights determined by them. For the rights in question were established only by first establishing the efficacy of the treaty provisions upon which they were based as against conflicting State laws; and this efficacy was in turn established upon the basis of the general principle of the supremacy of all treaties made by the

United States as against any State laws or constitutions whatsoever. Finally, it cannot be legitimately argued that the State laws set at naught in the precedents just mentioned did not embody reserved rights of the States. For in *Ware v. Hylton* it was explicitly ruled by the majority of the Court that the State had had the right originally to enact the law set aside, while by Justice Wilson the question was argued upon both assumptions. And, as to *Fairfax v. Hunter* and *Chirac v. Chirac,* it has been acknowledged from the beginning by the exponents of the doctrine of State rights that the question of the right of the States to regulate the faculty of aliens in the acquisition, inheritance, and bestowal of real estate lying within their boundaries involved the entire constitutional issue.

5. *The fact that these early precedents have never been overruled.*—Judicial utterances asserting the doctrine that the reserved rights of the States set a constitutional bar to the treaty-power of the United States are confined, with the exception of one or two circuit court decisions interpreting Indian treaties, to obiter dicta, ordinarily of a very gratuitous sort. The reserved rights of the States have never received vindication in a single decision of the Supreme Court of the United States pronouncing a treaty of the United States unconstitutional because of its operation within the field of power which ordinarily belongs to the States.

6. *The logical and historical foundations of the State-rights doctrine.*—The moderate exponents of this doctrine would like to distinguish certain rights which are reserved to the States only conditionally upon the National Government's not exercising conflicting power from other rights alleged to be reserved absolutely to the States, but have never formulated a coherent principle demarking the distinction. More rigorous exponents of the doctrine would confine the treaty-power to the field of powers which, exclusive of the treaty-power, are delegated to the United States, but the difficulties attaching to this view were admitted by Jefferson himself, who took it from Nicholas, and it has been hopelessly discredited by the history of negotiation, and adjudication thereon. But there are more far-reaching objections to the State-rights view of the treaty-power upon the score of history. Not only was this view sustained during the period of its greatest prominence by immediate concern for a great sectional interest which no longer exists, but it rests upon a view of the fundamental character of the Constitution that is without historical warrant: the view, namely, that the Constitution was a compact among the State sovereignties; from which view was deduced quite logically, but to the utter defiance of the history of the matter, the proposition that the States in the exercise of their reserved powers are capable of confronting the National Government in the exercise of its delegated

powers, when the two jurisdictions clash, as equal sovereignties.

7. *The present-day state of our constitutional jurisprudence.*—This, as respects the commerce clause of the Constitution, has avowedly returned to the basis of *Gibbons v. Ogden;* as to the national power of taxation, withholds only the purely governmental agencies of the State from the operation of national power; and as to the national treaty-power, invokes afresh *Ware v. Hylton* and ensuing precedents.

8. *The continuity of practice in connection with treaty-making which has from first to last kept essentially within the same lines.*

9. *The vast preponderance of learned opinion, from Kent and Story, through Calhoun and Cushing, to Butler, Tucker, Pomeroy, and Willoughby.*

But now is there any real danger to the police powers of the States to be anticipated from this doctrine? I think not, for the following reasons:

First because the constitution of the Senate fits it to act as the guardian of State interests. From the outset to the present moment the Senate has exercised its undoubted prerogative in connection with treaty-making with the utmost vigor, accepting, rejecting, amending the work of the Executive with that entire freedom which the framers of the Constitution intended it should enjoy in this connection. In other words, the political check which the organization of the treaty-making power was designed

to effect against extravagant and wanton invasions of the reserved powers of the States has not diminished in force since the day when the security of the States was thought to rest exclusively with it. Furthermore, it may be safely conjectured that at no time between 1787 and the present moment would the advocates of State rights have been willing to exchange the participation of the Senate in treaty-making in return for the establishment of the principle of reserved rights enforceable by the Supreme Court. On the contrary, this party has more than once made efforts looking to quite a different end, namely, the supersession of the Supreme Court by the Senate in the entire business of interpreting the Constitution.

But, secondly, while the power of the Senate remains the same effective check upon treaty-making that it was at the outset, another check, also political, has in the interval been developed. I refer to the power of Congress to abrogate treaties. By *Taylor v. Morton,*[1] decided in 1855, the application of this right was confined to treaty provisions dealing with subject-matter falling within the enumerated powers of Congress. But by the *Chinese Exclusion* cases (preceded by the *Head Money* cases) [2] it was made general, in virtue of Congress' general power in connection with treaties, under the "necessary and proper" clause. The tremendous effectiveness of this check, exercised in good faith and within the

[1] 2 Curt. 454.

[2] 112 U. S. 580.

recognized canons of International Law, is at once obvious. It is, therefore, worth noting that, in its final dimensions, it is immediately due to the fidelity of the federal judiciary, in the early Chinese cases, to the established view of the range of the treaty-power in relation to State power.

But the most effective check of all upon the treaty-power in behalf of the police powers of the States, and the one that would have always to be relied upon principally, no matter what powers the Court might venture to assume in the supervision of treaties, resides in the single fact that it is of primary interest to the United States that the police powers of the States shall not be essentially abated by treaty. The question we are discussing is, of course, primarily a question of power; but it occasionally happens that a maxim of policy is of so universal acceptation, that it as truly and conclusively directs the operations and determines the limitations of power, as if it were a constitutional maxim of full legal standing. And of such character is the maxim that no nation will surrender by treaty with another that degree of control over its internal concerns which all nations habitually retain. Nor does the fact that, in the case of the United States, the larger share of this control falls to the States to exercise at all alter the calculation. In this reference,—as, indeed, in most others,—the interest of the United States, the external sovereign, and of the States, the usual agents of municipal government, is identical. And

in fact, so it has always been regarded by the treaty-making power. Every case where a treaty of the United States has operated to suspend State power is reducible to a single principle: the suspension was accorded by the treaty-making power, acting in the most unimpeachable good faith, in return for a similar suspension by the contracting nation of its municipal jurisdiction in favor of the United States.

But there is a further practical restriction upon the treaty-power, tending to secure to the States their powers and rights at essential points, a restriction which consists partly in the settled canons of International Law for the interpretation of treaties, and partly in the fact that so far as treaties confer individual rights to the derogation of State jurisdiction they fall to the courts for enforcement. The matter I refer to is this: when a treaty provision is perfectly explicit, if it is otherwise constitutional, the courts must enforce it, no matter what rights, powers, or prerogatives of a State it sets at naught. But the fact is that treaty-provisions are often ambiguous. When this is the case, the settled maxim of International Law is that nothing passes by implication to the diminution of the sovereignty of the granting power. When, therefore, the granting power is the United States, the States, to whom belong most of the municipal powers of sovereignty in the United States, become beneficiaries of the maxim quoted. The *Louisiana Quarantine* case is fresh in mind, but a still more recent instance is

furnished by the dictum of the Court in the *Japanese Immigrant* case of 1903,[3] in which the Court, referring to the generality of the language of Article I of the Treaty of 1894 with Japan, said: Aside from the specific exception in Article II in favor of the police power,

> "we should not be inclined to hold that the provision in the Treaty with Japan that the citizens or subjects of each of the two countries should have 'full liberty to enter, travel, or reside' . . . has any reference to that class, in either country, who from their habits or condition are ordinarily or properly the object of police regulations designed to protect the general public against contact with dangerous or improper persons."

True, this species of doctrine must not be pressed too far. "*Uberrima fides*," the Court has said, is the controlling maxim in the interpretation of treaties.[4] But there are plenty of cases where *uberrima fides* can be rendered and the Court still refuse to make indiscriminate donation of that branch of the national sovereignty in which the States by virtue of their powers of police so largely participate.

With these various impediments affixed to it, the treaty-power, it is submitted, is quite adequately restrained in relation to the police powers of the States. The disposition of us Americans, however, is to put all our reliance upon constitutional limitations.

[3] 189 U. S. 86, 97.
[4] Tucker *v.* Alexandroff, 183 U. S. 424, 437.

This propensity has not always produced the most happy results. It has rendered us, as a people, the most litigious on earth; it has cumbered our judicial processes with obstacles and delays that defeat the very object of those processes; it has substituted in our legislative chambers only too often for the question, "Is it good?" the question, "Is it constitutional?" In discussing questions of power in a government resting as immediately upon public opinion as our own and so well shaped to forward the opinions of localities as well as of populations, it were well to bear in mind the sensible words with which Justice Johnson, in deciding the old case of *Anderson v. Dunn*,[5] answered the familiar argument that power may be abused:

"Melancholy would be that state of distrust which rests not a hope upon a moral influence. The most absolute tyranny could not subsist where men could not be trusted with power because they might abuse it, much less a government which has no other basis than the sound morals, moderation, and good sense of those who compose it. Unreasonable jealousies not only blight the pleasures, but dissolve the very texture of society."

With these words we may leave the question, adding only, that it is no purpose of constitutional limitations to multiply points of conflict between national and State authorities, which, however, would be exactly the result of a judicial recognition

[5] 6 Wheat. 204, 232 (1821).

of the doctrine that the police powers of the States set a bar to the treaty-power of the United States; and further, that it is preëminently the purpose of the doctrine of the police power to establish the right of the State, acting for the public interest, to prescribe the limits of allowable private action, a purpose in the achievement of which, however, it is palpably hampered by any attempt to make of it a bar to the constitutional realization of a larger public interest,—that of the Nation.

And the national interest in the field of our foreign relations is a consideration of ever increasing importance. The United States is to-day a member of the Family of Nations sustaining a closeness of relationship with the other members thereof that had not been dreamed of a quarter-century ago. From year to year, too, the concept of international obligation grows apace, a development to the forwarding of which, in the interest of peace, the United States has in the past made notable efforts. But the United States cannot, on the one hand, stand in the foreground of those who would promote friendship, good faith, and reciprocity among the nations of the world, and on the other hand, reserve to itself the right to recede from its stipulated covenants on the ground that, after all, it is not a real nation. This were humiliation and imbecility indeed.

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